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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF LOUISIANA.

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Widow Botto vs. Berges et al.

No. 11,745.

WIDOW A. BOTTO VS. MRS. C. F. BERGES ET AL.

47 959
52 1782

The purpose of the suit was to have an agreement annulled, in which plaintiff promised to buy and the defendant to sell immovable property.

The formalities required have been complied with in the first adjudication of the property at tax sale.

It was properly adjudicated to the highest bidder, under Act 82 of 1884, without regard to the amount due on the property.

Since the adjudication the taxes assumed by the adjudicatee have been paid, thereby perfecting the tax title beyond all question. But the subsequent tax sale of the property was a nullity. It was adjudicated as property of the State, although it was not shown that the State ever acquired any right to make such a transfer. No proof was made of the fact of adjudication to the State for taxes, and yet the tax collector undertook to sell it as property that had been adjudicated to the State for taxes.

The joint owners, who held under the first and legal tax deed, signed a "quit claim," thereby transferring good title to the defendant. All, except one, signed a document in due form.

The latter *sans seing prive*, authorized the relinquishment of his right as owner.

No attempt was made to procure authentic evidence or relinquishment as required.

The purchaser has the right to a title authenticated in due form.

The absence of such evidence justified the plaintiff in refusing to take title.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

E. J. Méral and Albert Voorhies for Plaintiff, Appellee.

There must be two attesting witnesses to an authentic act; otherwise its execution must be proven as an act under private signature. C. C. 2234.

The same rule applies to acts executed by a commissioner. Nor can the act be admitted even to prove *rem ipsam*, without proof of its execution. *Leibe vs. Haversmith*, 39 An. 1050; *Miller vs. Werner*, 22 An. 457; and *Langley & Kinkead vs. Burrows & Co.*, 15 An. 392.

A promise of sale subject to examination of titles means that the vendor must exhibit a regular chain of titles, free from all cloud.

A chain of titles running back to less than ten years does not meet the requirement; more especially when the two first deeds of this chain are tax sales.

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A promise of sale, accompanied by a deposit of earnest money, is governed by provisions of C. C., Art. 2463, which is of limited application, and recognizes the liberty of either promisor or promisee to withdraw from the main obligation. But when either party is at fault, and there is no cause to rescind the obligation, then recourse is had to general principles, as found under C. C., Arts. 1779, 1797, 1883, 1893.

Dart & Kernan for Defendant and Appellant:

The title tendered plaintiff is valid and legal in every respect, and one from the acceptance of which no trouble or annoyance could possibly result. It is maintained by the ratification of the heirs of Piles (or Pyles), the prescription of three years, and the numerous adjudications maintaining titles of this nature. *Martin vs. Langenstein*, 43 An. 791, and cases cited; *Henderson vs. Ellerman*, 47 An. 306.

The ratification of tax titles, under Act 82 of 1884, is unnecessary; therefore, whether document complained of be authentic or not, is of no consequence to the validity of the title tendered by defendant.

A tax sale made in exact conformity with the requirements of Act 82 of 1884, and the principles announced in *re Lake*, 40 An. 142, and in *re Douglas*, 41 An. 765, will be affirmed to pass a legal and valid title, there being no question raised as to the legality in the assessment of the property. 47 An. 306.

Argued and submitted April 23, 1895.

Opinion handed down May 6, 1895.

The opinion of the court was delivered by

BREAUX, J. This is a suit to recover two hundred dollars deposited by plaintiff as earnest of her promise to buy.

The plaintiff alleges that defendants' title was not legal and valid; that the defendants have not made a tender of the title; that they are not the owners, and that there are mortgages and privileges recorded against the property.

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That, although unable to give good title, the defendants refuse to return the money deposited.

The answer controverts plaintiff's demand, and contains a plea in reconvention; it sets out the validity of the title, and prays for judgment condemning plaintiff to take title and pay the fine or forfeit the earnest money.

In the written agreement, in compliance with which the deposit was made, the property is described. The plaintiff promised to buy, to buy, subject to an examination of title.

The following is the chain of title:

On the 13th of July, 1886, the property was adjudicated at tax sale, under Act 82 of 1884, to W. A. Piles for Widow Wm. Piles for thirty-three dollars.

The taxes at the time amounted to one hundred and one dollars and twenty cents. In the deed the purchaser assumed all the State, city, parish and municipal taxes on the property for the year 1880 and years subsequent.

On the 21st of August, 1890, the same property was sold by the tax collector, under Act 80 of 1886, to Miss Alice M. Stickney, for the taxes of the years 1880 to 1888 inclusive, who also assumed taxes for years subsequent to that last mentioned. Miss Stickney sold to J. H. Black, and in 1891 Black sold to the defendant, Mrs. C. B. Berges.

In the last act, the heirs present, of Mrs. Wm. Piles intervened and signed a quit claim to the property.

One of the heirs was an absentee, represented by an agent under a procuration acknowledged in New York before a notary, without witnesses.

A clerk of a court of record certified that the notary was duly authorized to receive the acknowledgement. was genuine.

The Secretary of State of New York issued the usual certificate, showing that the clerk was duly authorized to act.

But no witnesses having signed the procuration, under Louisiana laws it was an act *sous seing prive*.

Moreover, the procuration does not in terms refer to any property; it does not authorize the agent to relinquish any right to the property or to ratify the tax deeds, which are part of the chain of titles.

The judgment of the District Court rejected defendant's reconven-

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tional demand, and condemned him to return the two hundred dollars, earnest money.

The defendants prosecute this appeal. The appeal is before us only in so far as relates to the plea in reconvention. The amount of the principal demand is not within the jurisdiction of this court.

The tax deed, bearing date 13th July, 1886, when Mrs. Piles became the owner at tax sale, has every appearance of being regular and legal in all respects.

The required formalities have been complied with under Act 82 of 1884.

Subsequent to this date the property was, at another tax sale, adjudicated to Miss Stickney.

The adjudication at this last tax sale was illegal, and the title did not pass from the owner under that adjudication. The tax collector declared in the deed of adjudication that the property had been previously adjudicated to the State of Louisiana for the taxes of 1880 and subsequent years.

The adjudication was not proved, save the *ex parte* declaration of the tax collector contained in his deed of adjudication. There is no legal evidence before us of any adjudication, whatever, to the State.

The defendant doubtless felt the necessity of curing the patent defect in the chain of titles, and for that reason obtained from the heirs of Mrs. Piles a quit claim signed by all the heirs, in due form, except one, as we have already stated.

It is unfortunate for the defendant that the power of attorney is not authentic, and that the signature of the principal was not proven on the trial of the case.

The document produced by the defendant was an act under private signature, and not admissible as authentic evidence to prove title.

The notary public before whom the acknowledgment was signed was vested with authority similar to that exercised by notaries in Louisiana.

The acknowledgment before a notary in this State would not have made it authentic, without witnesses, and the same must be true of an act acknowledged in another State to effect the title to real property here. *Langley & Kinkcad vs. Burrows*, 15 An. 392, 393; *Miller vs. Wisner*, 22 An. 457, 458.

The promise to transfer property for cash, under a title in every respect legal, was a condition not complied with by the defendant,

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and it, in consequence, justifies the plaintiffs in praying that the written agreement of promise to buy be declared no longer of any effect.

The defendants' reconventional demand is properly dismissed.

The judgment, is therefore, affirmed.

No. 11,674.

SOLOMON REINACH VS. MAURICE M. LEVY.

The husband deserted his wife after two weeks' marriage and permanently disappeared.

The wife bought real estate with her paraphernal funds during the marriage. She sold it after the dissolution of the marriage. It was her property and never belonged to the community. The title involved here is valid and legal.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Chrétien & Suthon for Plaintiff, Appellant.

The burden of proof is upon the wife to establish affirmatively and clearly that she bought with her own separate funds, under her own separate administration. 17 La. 300; 12 R. 582; 2 An. 763; 5 An. 811; 8 An. 286; 17 An. 568; 15 An. 119; 16 An. 214; 20 An. 532; 21 An. 344; 24 An. 521; 30 An. 170; 35 An. 570.

Even when the act contains specific mention thereof, giving derivation of funds. 1 La. 206; 11 An. 326; 18 An. 126; 20 An. 531; 32 An. 612; 30 An. 169; 5 An. 741; 35 An. 570.

The purchaser cannot be made to take a title which is not unquestionably good and which is subject to litigation. 41 An. 1100; 40 An. 571 (574).

Benjamin Ory and Lazarus, Moore & Luce and Branch K. Miller for Appellees:

When a husband has voluntarily lived separate and apart, and the wife during that time has purchased real estate, the title to which being on record in the name of the wife, as a donation made to her individually, was subsequently acquired by an innocent third person in good faith, under a chain of title from the

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wife, it was held that the husband could not, after the wife's death, recover the property, as having belonged to the community and having been sold by the wife without authority.

The husband, by parol evidence, could not thus despoil the purchaser of immovable property, acquired under a chain of recorded titles apparently perfect, without notice, actual or constructive, of the husband's latent claim, which has no basis in equity. *Wooters vs. Feeney*, 12 An. 449.

Though it be not so stated in the act, the wife may show that property purchased in her name was purchased with her paraphernal funds, under her own administration. Such property is paraphernal, not community. *Succession of Pincard vs. Holten*, 30 An. 167.

Where one of two innocent persons must suffer a loss through the misconduct of another, the loss ought rather to fall upon him who put it in the power of the third party to inflict the injury. *McMahon vs. Dubuclet*, 27 An. 45; *Gardner vs. Maxwell*, 27 An. 562.

Submitted on briefs, April 26, 1895.

Opinion handed down, May 6, 1895.

The opinion of the court was delivered by

BREAUX, J. The plaintiff was subrogated to the rights of the adjudicatee of property offered at auction. He made the usual deposit of ten per cent. with the auctioneer.

He sued for the cancellation of the adjudication and the return of the amount deposited, having ascertained, he avers, upon an examination of the title that it is defective, as it was bought from a divorced wife; that it was bought by her prior to the decree of divorce, and became part of the community existing before she obtained her divorce.

Defendant's author married one Cohn about twenty-five years ago. Two weeks after the marriage he deserted his wife, ran away, and she has not heard from him since. She was a servant at Mobile, Ala., at the date of her marriage. Her employer testifies that to his knowledge she had a few thousand dollars—an amount larger than the amount she paid for the property involved in this case.

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She had obtained her divorce some time prior to the sale by her to the defendant.

The good faith of the defendant is not questioned. The record does not disclose that he knew that the property was acquired by his vendor during the existence of a former marriage.

The proof is that it was not community property. It was bought by Caroline Weil in 1883, and the act of sale to her does not show that she had ever been married at that time. She appeared in the act as a *femme sole*.

Having contracted a second marriage, in her act of sale to the defendant she was authorized by her second husband. It is evident that in her business transactions, at least, she was quite reticent regarding a first marriage.

Having bought the property with her separate funds, it is manifest that her first husband, if living, has no right to recover any portion of the property.

Much less could he recover the property from the defendant, a third person, who purchased from a wife (duly authorized by her second husband) who was the owner by purchases, in her name, prior to her second marriage.

Even without reference to the great lapse of time since the date of her first husband's desertion and disappearance, the title is not defective.

But long acquiescence is in itself a factor which must add great weight to existing conditions.

The conclusion of the court had much less support in *Wooters vs. Feeney*, 12 An. 449, 450, and yet the sale was declared legal.

The court regarding the husband, pertinently says:

"He lived apart from his wife, unknown to the world as her husband; permitted her to manage her affairs as a *femme sole*, contributed nothing to the common fund and during her lifetime did not pretend to have any interest in her affairs.

"He can not, by parol evidence, succeed in despoiling the defendant, who is a purchaser for a valuable consideration of immovable property under a chain of recorded title apparently perfect, without notice, actual or constructive, of the plaintiff's latent claim which has no basis in equity, and is the result of his own negligence or misconduct."

Coco vs. Gumbel, Liquidator.

Such being the conclusion, under the state of facts in that case, we are convinced the judgment should be here affirmed.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed.

No. 11,700.

CLARA COCO VS. F. GUMBEL, LIQUIDATOR; PERKINS BROS. VS. F. GUMBEL, LIQUIDATOR (CONSOLIDATED).

One who claims the ownership of a note secured by mortgage and a subrogation by purchase, who is not shown to have been a creditor, is not entitled to legal subrogation. The defendant, on the notes paid by him for the maker, is not entitled to legal subrogation.

A PPEAL from the Tenth Judicial District Court for the Parish of Avoyelles. *Lafargue, J., ad hoc.*

J. C. Cappel and Joffrion & Joffrion for Plaintiffs, Appellees.

G. H. Couvillon and Saunders, Miller, Smith & Hirsh for Defendant, Appellant.

Argued and submitted, March 16, 1895.

Opinion handed down, April 8, 1895.

Rehearing refused, May 20, 1895.

The plaintiffs, as holders of the notes of which Paulin J. Coco was the maker, secured by vendor's mortgage, bearing in favor of his vendor, Robert Coco, assert by third oppositions, that F. Gumbel, liquidator, had no privilege or mortgage; that he was not subrogated to rights of Thorpe, the vendor of Robert Coco, but that he had absolutely paid the notes, and that he had thereby entirely extinguished the vendor's mortgage.

The court having determined the question of law presented by an appeal, when it appears that through error, there was an omission to introduce certain evidence to explain receipts given, and the court concludes such error should not prejudice the defendant and appellant, the case will be remanded.

BREAUX, J., delivered the opinion of the court.

No. 11,782.

C. AMATO ET ALS. VS. ERMANN & CAHN ET ALS.

It is no ground for setting aside a judicial sale that the movables attached to a plantation which were about to be sold in block with it, under a seizure, should have been fraudulently undervalued in the separate appraisalment of the land and the movables, made with the view to fix the *pro rata* of the proceeds of sale, to be paid to the mortgage claim upon the land and to the privileged claim upon the movables. The relief of the privileged creditors upon the movables, if any they have, is limited to the setting aside of the fraudulent appraisalment, and to a distribution of the price upon a new valuation. Succession of Lenel, 84 An. 868.

It is not a ground for setting aside a judicial sale that the writ under which the property was sold issued for a larger amount than was due (*Lynch vs. Kitchen*, 2 An. 843), nor because, prior to the sale, the seizing creditor had consented, in the event of his purchasing the property, to make a subsequent disposition of it to a third person in the interest of the seized debtor. The subsequent disposition might be attacked, but the sale should stand, as the creditor in seizing, selling and purchasing, would have only exercised a legal right. 43 An. 432, 873.

Where a mortgage creditor has seized a plantation, subject to his mortgage, together with all the mules, carts, agricultural implements thereon, in view of an anticipated sale of the property and the realization of a fund therefrom, the laborers who claim a privilege for payment of wages due them have an unquestionable right to present their claims to the District Court by way of third opposition, without reference to the amounts claimed by them being within the jurisdiction of that court. *Shiff vs. Carprette*, 14 An. 802.

In their contention the laborers had a common interest in invoking the aid of the district court; the aggregate amount of the claims in dispute being over two thousand dollars, the appeal by plaintiffs to this court will be maintained. The proceedings attacked as fraudulent, were ordered in a suit in the parish of St. James. The seized debtor and the seizing creditors, charged with collusion, are necessary parties to such an action. The seized debtor resided in the parish of St. James. The proceedings were properly attacked in the court of his domicile. Having issued the orders, the District Court of St. James was the proper tribunal to pass upon the issues.

A PPEAL from the Twentieth Judicial District Court for the Parish of St. James. *Guion, J.*

A number of laborers, creditors of one Auguste Servel, unite in a joint petition claiming amounts due them by Servel for wages for labor performed by them in his employ on his Golden Grove plantation, in the parish of St. James, from September, 1898, to February, 1894, in planting, winrowing and planting cane, and in harvesting and manufacturing into sugar the cane crop on said plantation in the year

47	967
47	1344
47	937
49	397
47	967
51	54
51	484
47	967
106	87
47	967
115	799

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1893. That to secure the payment of their claims they have a privilege, under Art. 3217 of the Civil Code, on all the mules, carts, agricultural implements and other things which serve for the working of the plantation. That Ermann & Cahn, as holders of mortgage notes drawn by the said Serval, applied for and obtained a writ of seizure and sale in the District Court of the parish of St. James, and under said writ the sheriff of said parish seized and advertised for sale in block, the said plantation, together with forty-five mules, nineteen three-mule carts and other movables on which they had a privilege, as aforesaid, superior in and priming the mortgage rights of the seizing creditors, and on the 12th day of January, 1895, said plantation and movables, were, by said sheriff, acting under said writ, adjudicated in block to said Ermann & Cahn for the price of seventeen thousand seven hundred and thirty-five dollars, as the whole would appear by the record in that suit. That petitioners became intervenors and third opponents in said case of Ermann & Cahn vs. Serval, and in order to preserve their privilege, and to adjust their rights with those of the seizing creditors, they applied for and obtained an order for a separate appraisement; (1) of the Golden Grove plantation, and (2) of all the movables serving for the working of said plantation, and effected with a privilege in favor of petitioner, as aforesaid, said movables comprising forty-five mules, nineteen three-mule carts, and all the agricultural implements; that the said adjudication of the said plantation, and movables made to Ermann & Cahn, on the 12th January, 1895, and the sheriff's deed executed subsequently to said adjudication, are null, void and of no effect for the reasons:

1. Because the aforesaid order of the court, directing that the said plantation and movables be separately appraised, was disobeyed and disregarded.

2. Because the naked plantation was intended to be appraised at nineteen thousand dollars, which is about its real value, while all the movables, comprising forty-five mules, nineteen three-mule carts, all the agricultural implements and other things which serve for the working of the plantation, were not appraised in detail or minutely as required by law; but were appraised in block, at one thousand dollars only—that is, at one-third or one-fourth their actual value—and said appraisement is fraudulent, and is the result of collusion between Ermann & Cahn and the said Serval, for the purpose of depriving petitioners of their just rights.

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3. That the mortgage notes, on which executory process issued in the case of Ermann & Cahn, were originally held by Miss P. A. Hopkins, who had instituted executory proceedings against the said Servel. Large expenses had been incurred under her seizure of the said plantation, amounting to eight thousand two hundred and ninety-nine dollars, which were decreed to be paid by priority over said mortgage notes, amounting to twenty thousand dollars. By an act passed about the 9th of June, 1894, before Felix J. Dreyfous, a notary public for the parish of Orleans, said notes and the mortgage rights of the said Miss Hopkins, under her seizure, were transferred to the said Ermann & Cahn for the price of thirty-two thousand three hundred and forty-three dollars, and the said Ermann & Cahn caused themselves to be substituted as plaintiffs in said case of Hopkins vs. Servel, and then released said seizure; that a large part of said price of thirty-two thousand three hundred and forty-three dollars, paid by Ermann & Cahn for the purchase of said notes (they allege about fifteen thousand dollars of said price) were furnished to them by the said Auguste Servel for the purpose of making said payment. That there was at the time of the sale of the plantation, on the 12th of January, 1895, and there was still a private agreement between the said Ermann & Cahn and the said Auguste Servel, by which the former was to retrocede, and sell the Golden Grove plantation to the said Servel, through a third person, for a bonus, and the difference between the cash actually paid by the said Ermann & Cahn and the said sum of thirty-two thousand three hundred and forty-three dollars.

That a proposition substantially similar had been made to Miss Hopkins, through her counsel, while the plantation was under her seizure. That the mortgages on said property exceed one hundred thousand dollars.

That since the adjudication to the said Ermann & Cahn, one Pierre Schepp, a confidential friend and adviser of the said Servel, and his *alter ego* in the protection of his interests in the protracted litigation in which the said Golden Grove plantation was involved, has been in charge of the same, employing overseers, working it in his own name, but for account of the said Servel. That, as a part of a long concocted scheme to cover up and shield the Golden Grove plantation from the pursuit of his creditors, the said Servel, on the 29th July, 1889, by act before Gaudet, notary public, executed a simulated

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mortgage on said plantation, second in rank, and still of record, in favor of the said Pierre Schepp, for thirty thousand dollars. That no consideration was paid for said mortgage, which is a pure fiction, and has no legal existence.

Ermann & Cahn excepted to plaintiff's demand; that the court was without jurisdiction, *ratione personæ*, as the firm of Ermann & Cahn, and the individual members thereof were residents of the parish of Orleans, and are not suable in the parish of St. James. That there was a misjoinder of both plaintiffs and defendants. That the petition sets forth no cause or right of action, and discloses no interest in the plaintiffs in attacking the mortgage of Ermann & Cahn, or the sale and adjudication made to them. That the plaintiffs are estopped and debarred from suing to annul the sale or adjudication to the defendant or the mortgage, under which said sale was made for the following reasons:

1. That the plaintiffs, claiming a laborers' privilege upon the growing crop of said plantation for the year 1893, and also on the crop of 1894, entered into an agreement with Ermann & Cahn, recognizing them as mortgagees, and as holding and owning the mortgage under which the adjudication was made, and by the terms of which agreement plaintiffs accepted in compromise and settlement of their alleged claim and lien on the said crop, the sum of eight hundred dollars; that having by this agreement recognized the validity and genuineness of the mortgage sued on by them, and having received a benefit therefrom under said compromise and agreement, the plaintiffs are estopped from contesting or disputing the same.

2. That the plaintiffs filed a third opposition in the said mortgage foreclosure proceedings, and claimed the laborers' privilege upon the working animals and implements described in their petition, secured an order of court for the separate appraisement of same, appointing under said order an appraiser who acted on their behalf in appraising the property, and also obtained an order, directing that the proceeds arising from the sale be retained in the hands of the sheriff; that said appraisement was effected, and that having thus claimed the proceeds, they recognized the validity of the mortgage of Ermann & Cahn, and of the proceedings merging into said sale, and are now estopped from attacking said mortgage or suing for the nullity of the sale.

3. That the plaintiffs were present at the offering and sale of said

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plantation under the writ of seizure and sale complained of; that they made no protest or objection to the said sale, but, on the contrary, by and through their duly authorized attorney at law, made several repeated bids on said plantation and ran the same up to the final price of adjudication, seventeen thousand seven hundred and thirty-five dollars, the said attorney and representative of said plaintiffs repeatedly declaring during the process of offering for sale that he was bidding on the property for his clients and intended to run the same up to its full value in order that the *pro rata* division of the proceeds coming to his clients (the plaintiffs) would be correspondingly augmented; that by these acts and conduct of the plaintiffs, manifested on every preliminary leading up to and during the sale, in which they took an active part, they are estopped from attacking the validity of the mortgage under which the executory process ran and the sale and adjudication had thereunder.

The exceptions filed by the defendants were sustained.

Plaintiffs appealed.

J. V. Chenet and B. R. Forman Attorneys for Plaintiffs and Appellants:

A suit involving the title to real estate, and the nullity of judicial proceedings resulting in a sale of real estate can be brought in the parish where the property is situated, without regard to the domicile of the defendants. C. P. 163.

Creditors having a common interest may join in a suit to annul a sale and reduce a mortgage on the property of the common debtor. 20 An. 254, *Boon vs. Beemel*; 28 An. 517, *State ex rel. Roudanez*; 38 An. 1351; 34 An. 201, *State ex rel. St. Cyr vs. Jumel*.

Plaintiff's evidence need not be set forth specifically in his petition. Specifying one of the ways in which plaintiffs have been defrauded does not preclude them from giving evidence of other acts tending to establish the same fraud practiced upon them. *Miller vs. Bedell*, 21 An. 573; *Beels vs. Knight*, and N. S. 268; *Montgomery vs. Chaney*, 13 An. 207, and if a petition be vague the order should be to amend and not to reject.

A fraudulent conspiracy between a plaintiff in executory proceedings, suing on a mortgage largely in excess of the amount really due, and the defendant, by a fraudulent appraisement of a part of the

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property on which other creditors of the debtor have a privilege, to buy in their property at a vile price, and cheat the privileged creditors, gives a cause of action to annul the sale so procured and to reduce the mortgage. *Jackson vs. Ludeling*, 21 Wallace, 616; *Cordeville vs. Hosmer*, 16 La. 590; *McDonough vs. LeRoy*, 1 R. 173; *Succession Hiligsberg*, 1 An. 340; *Zacharie vs. Winter*, 17 La. 76.

Laborers have a privilege on things which serve for the working of the plantation. C. C. 3217; 36 An. 184; 34 An. 535; 28 An. 749; 32 An. 1285.

An attorney at law employed to collect a debt, has no authority (unless especially authorized thereto) to buy a plantation for his clients, and after vainly protesting against a fraudulent and unjust appraisement, he can not, by bidding at the sale, estop his clients from attacking the sale for fraud.

Lazarus, Moore & Luce for Defendants and Appellees:

Every one must be sued at his domicile, unless in such cases as are excepted under the Code of Practice. This is not one of the exceptions, and is no suit to annul judgment. C. P. 162, 163; *Stapleton vs. Butterfield*, 34 An. 822.

Plaintiffs between whom there is no paivity of contract or community of interest can not be joined in one suit. *Dyas vs. Dinkgrave*, 15 An. 502; *Mavor vs. Armont*, 14 An. 177.

Distinct demands, by different plaintiffs can not be cumulated so as to give jurisdiction. *Marshall vs. Holmes*, 39 An. 312; *Harrison vs. Morse*, 41 An. 239.

To annul a sale or mortgage as simulated and void, one must have an interest affected thereby, or sustain an injury which can be redressed by the avoidance.

One can not avoid a judicial sale without alleging and showing an injury. 6 An. 61; 8 An. 503; 31 An. 840; 43 An. 526.

One who has intervened, claiming the proceeds of a sale, and who has bid at the sale, is estopped from alleging or showing a simulation of the mortgage under which the sale was made and the nullity of the sale. C. P. 149, 612; *Bank vs. Delery*, 2 An. 648; *Livaudais vs. Livaudais*, 3 An. 454; *Harper vs. Bank*, 15 An. 136; *Culiber vs. Creditors*, 16 An. 288; *Howe & Whited vs. Gibbs*, 21

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An. 495; Frere vs. Mentz, 23 An. 547; Blessey vs. Kearney, 24 An. 289; Slocumb vs. Williams, 22 An. 186; Provosty vs. Carmouche, 23 An. 245; Walker & Vaught vs. Kimbrough, 27 An. 558; Coleman vs. Coleman, 37 An. 566.

There being no averment that the appraisers who made the appraisal acted fraudulently and collusively, the averment that Ermann & Cahn and Servel colluded carries with it no cause of action, in so far as it may have affected the action of the appraisers in making the appraisal. To have been a fraudulent appraisal, the appraisers must have been parties to that effect, fraud and collusion; and there being no averment to that effect, the petition in this respect shows no cause of action.

Argued and submitted, April 26, 1895.

Opinion handed down, May 6, 1895.

The opinion of the court was delivered by

NICHOLLS, C. J. The first questions which arise are those respecting the jurisdiction of the two courts.

Ermann & Cahn, as mortgage creditors of Servel, seized under ex-ecutory proces, the plantation which was subject to their mortgage, together with all the mules, carts, agricultural implements thereon. At the time of the seizure of these parties, the movables, it would appear, were under seizure by the laborers, claiming a privilege through writs of provisional seizure. In view of an anticipated sale of the property and the realization of a fund therefrom, the laborers had an unquestionable right to present their claims to the District Court by way of third opposition, without reference to their being under fifty dollars. Shiff vs. Carprette, 14 An. 802. The seizing creditors consented, so far as form was concerned, to their joining in a single petition.

The sale, with reference to which this third opposition was framed, having taken place (subsequently to the filing of the same) in a manner which the third opponents contend was unauthorized by law, they subsequently united in the present action, attacking the appraisal made prior to the sale, and the sale itself. Assuming that they could maintain this contention, they had a common interest in invoking the aid of the court to set the sale aside. We think

that the District Court, as to amount and jurisdiction of the cause, and that plaintiffs' appeal to this court, must be maintained—the aggregate amount of the claims and of the matters in dispute being over two thousand dollars.

We think the District Court had jurisdiction of the case, in so far as the domicile of parties was concerned. The plaintiffs attack certain proceeding ordered by the District Court for St. James to be taken in a suit pending before it, prior to and leading up to a judicial sale. They claim that these orders were not carried out, that the proceedings were fraudulent, and that the nullity of the sale would follow as a legal consequence. To such a suit the seizing creditors and the seized debtor, who are charged as having colluded in bringing about the illegal act, were necessary parties; the seized debtor was a resident of the parish of St. James, and the judicial proceeding attacked was before the court of his domicile. We think that court was the proper one to pass upon that issue.

Defendants rely, as we have seen, upon their exception of no cause of action, and of estoppel. To a certain extent at least, they can be taken up together, and we postpone a separate discussion of the question of estoppel until after we shall have examined and ascertained whether the demand of the plaintiff discloses a cause of action.

We do not think that the allegations of the plaintiffs, charging that Servel furnished Ermann & Cahn a large portion of the money with which they acquired the Hopkins mortgage, charging that at the time of the adjudication of the property, and at the time of the institution of this suit, there existed a private agreement between the seizing creditors and Servel, by which the former was to retrocede the property to the latter through a person interposed; that since the adjudication the property has been in the possession of Pierre Schepp, a confidential friend of Servel, who is working it in his own name, but on account of Servel, and that a fictitious mortgage, inferior in rank to that of the seizing creditors, was consented to by Servel in favor of Schepp, would, if true, lead up to the nullity of the judicial sale and to the granting of the relief which plaintiffs ask at our hands.

Granting that Servel furnished Ermann & Cahn with a portion of the money used by them in obtaining the transfer to them of the Hopkins mortgage, the effect of that fact would simply be to operate

a payment *pro tanto* of the indebtedness to Miss Hopkins, and Ermann & Cahn would still remain the owner of her claim, reduced, it is true, but none the less a claim secured by mortgage on the property, entitling them to executory process, and to a sale under the writ. If Ermann & Cahn proceeded upon their claim, with no other objection to their course than that the amount for which the writ issued and the property was sent to sale was too large, that fact would not affect the validity of the title, but simply the question as to the payment of the price. *Lynch vs. Kitchen*, 2 An. 845; *Gay vs. Hebert*, 44 An. 801; *Truxillo vs. Delaune*, 47 An. 16.

If the effect of the partial payment, through money furnished by Servel, was to reduce Ermann & Cahn's claim below their purchase price, they would have to hold the surplus, subject to proper payment to parties entitled to receive it.

The plaintiffs do not deny that at the time of the order of seizure and sale, and of the adjudication, Ermann & Cahn held a claim secured by mortgage on the property. They do not deny that they had the legal right to the order of seizure and sale which was issued upon their petition. No objection is made to any portion of the proceedings until the appraisement is reached, and the appraisement is attacked, not as to the valuation placed upon the plantation itself, but upon that assigned to the movables which were to be sold with it. If plaintiffs had the legal right to a separate sale of the movables, under their privilege and seizures, they expressly waived it, and consented to a sale in block. If plaintiffs claimed the legal right to ignore the sale under the mortgage, and to assert that their privileged rights remained upon the objects struck by their privilege, unaffected by the sale under Art. 8216, C. C., as giving them a separate, independent, direct remedy to be directed in spite of the sale against the mules, carts and agricultural implements effected by their privilege, they waived it, and consented that they should receive their *pro rata* from a sale in block. The case, with reference to the result of the simple fact that Servel had furnished a portion of the money with which the Hopkins claim was bought, is one where a mortgage creditor had issued a writ for too large an amount, and had under a writ of seizure and sale, which had issued under such circumstances, bought in the property. We leave out of view for the moment, and in making this statement, the objections raised to the appraisement made upon the movables. Granting that Ermann

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& Cahn, under their proceeding, could have acquired and did acquire a valid title to the property, we do not think that that result was injuriously affected by the existence, either at the time of the order of seizure and sale, or of the adjudication of an agreement, that after the sale should have taken place Ermann & Cahn would retrocede the property to some third person for the benefit of Servel.

If these parties had a legal mortgage on the property, they were free to enforce it, and if they enforced it, and cut off by becoming purchasers at the sale, all rights of the creditors of Servel, upon the property itself, transferring whatever claims creditors might have to the proceeds of sale, they were at liberty to do with their own what they pleased, and if they thought proper to transfer the property to a third person, in order that Ermann & Cahn might derive a benefit from it, that fact could not result in divesting them of rights which had legally vested in him under their execution. *Gilkerson-Sloss Com. Co. vs. Bond & Williams*, 44 An. 844. The creditors might, perhaps, (if the special agreement was one which would enable their debtor to evade their pursuit in the future), attack the agreement itself or make it turn to their own advantage, but they could not oust the purchaser from the property.

It is claimed by the plaintiffs that the adjudication to Ermann & Cahn was a simulation.

We do not see what bearing the mortgage granted to Schepp, or what bearing Schepp's present possession of the property, has upon the validity of the judicial sale made to Ermann & Cahn.

We now come to the real contention of the plaintiffs, which is, that by reason of what they claim to have been a fraudulent undervaluation of the movables upon which their privileges rested, they have the right to have the entire sale annulled and set aside. We are referred to cases where sales have been set aside by reason of no appraisalment, or of an improper appraisalment having been made.

In this particular case, the plantation, it is conceded, was properly appraised. The movables which were sold with the plantation in block, were sold in that manner, by express consent, by appraisers appointed in the precise manner which opponents asked for. The object of the third opposition on their part was to obtain their *pro rata* from the sale. They claim that on account of fraud in the valuation of the movables, their *pro rata* has been made to be too small. We do not think, that in order to reach the proper *pro rata* (assuming

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that there was fraud, and their *pro rata* was really too small), and in order to obtain relief after the sale has taken place, the entire sale should be set aside. Plaintiffs only interest is to obtain a larger amount of money from the sale than would be assigned to them as matters stand. Relief could have been obtained by them without the necessity of upsetting the entire sale. By proper allegations they could have attacked the appraisement, asked that it be set aside, a new one ordered, and that the rights and obligations of parties should be adjusted and apportioned under the new one. This relief they have not asked, and under the pleadings we can not grant it. We make the last statements upon the theory that they would not be estopped by remaining silent until after the sale, nor by the action of their counsel in bidding at the sale. Whether or not they would be estopped in asking relief to this extent is a question which we need not discuss, as it is not properly before us.

We think the judgment of the District Court, in so far as it finally closes an attack by the plaintiffs upon the judicial sale, is correct. We do not understand it to go any further, or to conclude the plaintiffs as to any right and remedy they may have in respect to seeking to have the appraisement of the movables set aside for fraud, a new one taken, and an adjudication made of the rights and obligations of parties had on the basis of a new appraisement of the movables, all questions upon that subject are left open by the judgment, and so construing it, we affirm the judgment appealed from.

No. 11,768.

STATE OF LOUISIANA VS. NUMA DUDOISSAT.

Where the testimony of a witness has been assailed as to a particular fact stated by him, similar prior statements made at an unsuspicious time may be received, to corroborate his testimony.

Article 178 of the Constitution and Act 78 of 1890, create two distinct offences, the giving of a bribe, and the receiving of the same. There may be no intention to bribe by the giver, but if the party who accepts the same does so with the intent to influence his official action, he is guilty under the statute.

A general charge, which substantially covers the special charge requested, will justify the rejection of the special charge.

It is legitimate and proper to adopt devices or traps to detect crime, provided the device is not a temptation and solicitation to commit it.

The doctrine of estoppel does not apply to the State in criminal proceedings.

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Where a written charge has been requested and given, and the jury, after deliberating, returns into court and asks for instructions, in the absence of a bill of exceptions containing the oral instructions, it will be presumed the trial judge confined himself to his original charge. The absence of counsel for the defense, when the jury returns, is not sufficient to set aside the verdict.

Where the jury returns into court and informs it that they are unable to agree, it is not error for the judge to impress upon them the importance of the case, and urge them to listen to argument and sacrifice the pride of opinion, and send them back for further deliberation, when it does not appear that the jury was coerced into a verdict by a prolonged session, followed by physical suffering.

Miller, J., Concurring. The difference between this present case and the Callahan case (47 An. 444) is obvious. In the latter case it was conceded the witness to be corroborated was an accomplice in the fullest sense; in this case the guilty complicity of the witness is put at issue by argument and testimony laid before the jury.

The distinction between the *accomplice* and the *feigned* accomplice is recognized. When a *feigned* accomplice, the corroboration is not that required to sustain the credit of the ordinary accomplice. 1 Greenleaf, Sec. 882.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Ferguson, J.

M. J. Cunningham, Attorney General, and *Charles A. Butler*, District Attorney (*Lionel Adams* of Counsel), for the State, Appellee:

I.

The only question properly put in issue by the first bill is whether the corroboration of an apparent or feigned accomplice must be limited to evidence which tends to confirm the testimony of the feigned accomplice upon a point material to the issue in the sense that it tends to prove the guilt of the defendant; or, whether he is to be treated as an ordinary witness, and, where a design to misrepresent from some motive or relationship is imputed to him, he is to be permitted to show, in order to repel such imputation, that he made a similar statement at a time when the supposed motive did not exist, and when the relations of the parties were different.

Whether the witness was a feigned or a guilty accomplice is not to be determined by the court from the pleadings, but by the jury from the evidence. *Wright vs. State*, 7 Tex. Ap. 574; *State vs. McKean*, 36 Iowa, 343; *People vs. Farrell*, 30 Cal. 316; *People vs. Bolanger*, 71 Cal. 19, 20.

An accomplice is one who knowingly, voluntarily and with a common intent with the principal offender, unites in the commission of

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a crime. To constitute him an accomplice he must participate in the criminality of an act, either as a principal or as an accessory. Whart. Cr. Ev., Sec. 440; Bish. Cr. Pro., Sec. 1159; *People vs. Bolanger*, 71 Cal. 20 (1886); *Polk vs. State*, 36 Ark. 126 (1880); 1 Russ. Cr. 26; 4 Bl. Com. 34, 831.

A person who enters into communication with criminals and assists them without any criminal intent, but solely for the purpose of discovering and making known their crimes, is not an accomplice. 1 Am. and Eng. Ency. Law, 65; 1 Greenl. Ev., Sec. 382 and (n.); Whart. Cr. Ev., Sec. 440; 1 Bish. Cr. Pro., Secs. 1169, 1173, 1174; *Com. vs. Downing*, 4 Gray (Mass.), 29; *Com. vs. Willard*, 22 Pick. (Mass.) 476; *People vs. Smith*, 28 Hun. (N.Y.) 626, affirmed 94 N. Y. 649; *Harrington vs. State*, 36 Ala. 286; *Campbell vs. Com.*, 84 Pa. St. 187.

The test is whether the participant in the criminal act can be indicted either as a principal or as an accessory. *Com. vs. Wood*, 11 Gray (Mass.), 85; *Com. vs. Boynton*, 116 Mass. 343.

The testimony of a feigned accomplice does not need corroboration, and his case is not treated as the case of an accomplice. 1 Greenl., Sec. 382; 1 Tayl. Ev., Sec. 971; Whart. Cr. Ev., Sec. 440; *And. Law Dict.* 15; *Rex vs. Despard*, 28 Howell's St. Tr. 489, per Lord Ellenborough; *State vs. McKean*, 36 Iowa, 348; *People vs. Farrell*, 30 Cal. 316; *People vs. Barric*, 49 Cal. 342.

Where evidence has been offered to show bias, improper motive or recent fabrication, on the part of a witness, calculated to account for the testimony given, on redirect examination, or in rebuttal, proof of prior similar statements, made before such bias or motive could have actuated the witness, will be received. *Best's Prin. Ev.* 633 (n.), subhead "Corroborating Statements"; *Rapalje Cr. Pro.*, Sec. 316; 2 Phil. Ev. 523 (10th Ed.); 1 *Rosc. Cr. Ev.* 164 (n.); Whart. Cr. Ev., Sec. 492; 2 Tayl. Ev., Sec. 1380; 1 Greenl. Ev., Sec. 469; 1 *Stark. Ev.* 258; 3 Russ. Cr. 293; *State vs. Cady*, 46 An. 1346; *Com. vs. Wilson*, 1 Gray, 340, etc.

II.

THE INTENT OF THE BRIBE-GIVER.

The proposition of law contained in the general charge of the court to which this bill was reserved was in these words:

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"I charge you, gentlemen, that if you find from the evidence, beyond a reasonable doubt, that the defendant, at the time stated in the information, was a municipal officer; that said defendant received the said amount of money as a bribe, with intent to be influenced thereby in the performance of his public duties, with partiality and favor, he is chargeable with the crime of receiving a bribe, whether the giver of the bribe acted himself merely with a view to secure the detection and conviction of the accused or otherwise."

No objection was made at the trial that the charge contained contradictory statements; no opportunity was afforded the District Judge to correct a mistake evidently due to inadvertence; no bill was reserved setting up this ground of complaint; nor was it assigned as error. The matter is urged for the first time on appeal, and, therefore, can not be considered. *State vs. Deas*, 88 An. 581; *State vs. Romano*, 37 An. 98; *State vs. Johnson*, 38 An. 889; *State vs. Nelson*, 32 An. 842; *State vs. Bass*, 12 An. 862; *State vs. Benjamin*, 7 An. 47.

The only legal question involved in the consideration of this bill is the correctness of the instruction given.

The defendant contends that "to constitute the crime of bribery, which is a corrupt agreement, there must co-exist, on the part of the giver and receiver of the bribe, a corrupt intent; one to influence the other, and the other to be influenced to perform official duty."

The State maintains, on the other hand, that if the defendant, believing that a bribe was being given to him, received it with the corrupt intent to be induced and influenced to perform the duties of him required, in the execution of his office, with partiality or favor, his guilt is absolute without regard to the existence or non-existence on the part of the giver of a corrupt purpose to bribe.

The statute under which the trial was had provides substantially, in so far as this case is concerned, as follows:

"Any person who shall * * * offer or give any * * * money * * * to any officer, State, parochial, or municipal * * * with intent to induce or influence such officer * * * to perform any duty of him required, with partiality and favor, the person giving or offering to give, and the officer

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* * * so receiving or agreeing to receive any money * * * with the intent, or for the purpose or consideration aforesaid, shall be guilty of bribery, * * *." Act 78 of 1890, Sec. 1. No connection is made in this enactment between the intent of the giver and that of the receiver. They are not required to be reciprocal in the sense that the corrupt intent must co-exist in both. The intent of the giver is not referred to as a factor in the constitution of the crime of the bribe-taker.

To uphold the unreasonable construction placed upon the statute by defendant's counsel, it would be necessary to lose sight of the reason and spirit of the law—the evils to be remedied—and to read into it words and a meaning utterly at variance with the legislative purpose.

It is not provided that "the officer who, with a like purpose or intent, shall receive any bribe given with the intent, or for the purpose or consideration aforesaid, shall be guilty of bribery."

In defining the crime of the officer who receives or agrees to receive the bribe, it is made an offence to receive money given with a corrupt purpose or as a corrupt consideration to influence official conduct; the terms of the act being, "and the officer * * * so receiving or agreeing to receive any money, etc., * * * for the purpose or consideration aforesaid, shall be guilty of bribery."

But the statute also denounces as a separate, complete and independent offence, the receipt or agreement to receive by the officer, with the intent to be induced and influenced to act corruptly, of any bribe, without reference to the intent or purpose of the giver, who is not even mentioned in this connection. The language is "and the officer * * * so receiving or agreeing to receive any money, etc., * * * with the intent * * * aforesaid, shall be guilty of bribery."

This last construction meets the requirements of two fundamental rules of interpretation. It promotes the true policy and objects of the Legislature, and it derives the legislative intent from the words of the act, and not from conjecture *altende*. State vs. McCrystal, 48 An. 911; Com. vs. Inter. Liquors, 100 Mass. 21; Sedg. St. & Const. Law, 289; U. S. vs. Lucher, 134 U. S. 624; State vs. Archer, 73 Md. 44; Indianapolis vs. Hengeler, 115 Ind. 581; State vs. Godfrey, 97 N. C. 507; 28 Am. & Eng. Ency.

Law, 297, 305; Mr. Justice Story, in *Gardiner vs. Collins*, 2 Pet. (U. S.) 93; *Brewer vs. Blodgher*, 14 Pet. (U. S.) 178.

Not only does such a construction harmonize with the recognized canons of correct interpretation, but it is in accord with the spirit and reason of the common law adjudications.

To show that the guilt of the giver and that of the receiver are not reciprocal in the sense of being necessarily concurrent, it may be pertinent to consider what was originally understood to constitute bribery at common law, and what was formerly the law with us.

Blackstone defines: "Bribery is where a judge or other person concerned in the administration of justice takes any undue reward to influence his behavior in office." 4 Bl. Com. 139.

It is treated in the same limited and restricted sense by Lord Coke. 3 Inst. 145.

So that anciently the offence could only be committed by the bribe-taker.

It was afterward made to include officers not concerned in the administration of justice, and was extended so as to cover the case of giving a bribe.

By way of contrast, it may be stated that in Louisiana, between 1855 and 1878, bribery was defined to be the giving or promising to any judge or other person concerned in the administration of justice any bribe or reward to influence his behavior in office. Act 130 of 1855; R. S. 1870, Sec. 860; Act 59 of 1878.

So that it appears that neither in England nor here has the crime of bribery been considered to require the co-existence of a common corrupt intent on the part of bribe-giver and bribe-taker.

Nor have the courts so construed the law.

In *Com. vs. Murray* it was decided that if a person make a full and complete delivery of money to a magistrate, with the corrupt intention of influencing his decision in a matter pending before him, such person is guilty of corruptly giving a gift to the magistrate, although the latter receives the money in ignorance of what it is, and retains it solely for the purposes of public justice. 135 Mass. 530.

And in *Henlow vs. Fossat*, *Patterson and Coleridge*, justices, held that if it was clearly shown in a prosecution for corrupting a

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voter, that Garner, the person who received the money, never intended to give the vote—that is, never intended to be influenced by the bribe—but concealed this intention from the defendant, the offence was complete on the part of Fossatt (the defendant) by his giving the money for the purpose of inducing Garner to vote, and by Garner professedly accepting it on these terms. 3 Ad. and Ellis, 51.

So in the case before the court here, if Sherman never intended to bribe Dudoussat, but concealed this intention from him, the offence was complete on the part of the defendant by his receiving the money with the corrupt intent to be influenced in the performance of his official duties, and by Sherman professedly giving it on these terms.

No amount of research has been able to discover a single case in which defendant's contention has been maintained.

In this State bribery is a statutory offence, and consists in the doing of what is prohibited by the act which creates it.

Suppose that, without any reference to Sherman or his purpose in paying over the money, pursuing the words of the statute, it was charged that Dudoussat, with the corrupt intent to be influenced to perform the duties required of him as a councilman with partiality and favor, corruptly received from one Charles Sherman the sum of one hundred dollars as a bribe, with the corrupt intent on the part of Dudoussat and in consideration that he (Dudoussat) would corruptly favor a petition then pending before the council, granting to the said Sherman the privilege of operating a barroom, etc., would not the information be good in law?

It is sufficient if an indictment for an offence prescribed by statute states all of the facts and circumstances that constitute the offence, so as to bring the party indicted within the provisions of such statute. *State vs. McClanahan*, 9 An. 210; *State vs. Boasso*, 38 An. 202; *Whar. Cr. P. and P.*, Sec. 158; 1 *Bish. Cr. Pro.*, Sec. 509.

Nor is it necessary to prove more than is required to constitute the offence defined by the statute.

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III.

THE DOCTRINE OF ESTOPPEL.

The doctrine of estoppel has no place in the practice of criminal courts, where it is entirely inapplicable.

When a variance exists between the averments of the information and the proof offered in support thereof, the only material inquiry is whether what has been established amounts in law to a complete offence under the statute.

It is not required to charge in an information any more than is necessary to accurately and adequately express the offence, and when unnecessary averments and aggravations are introduced, they can be considered as surplusage, and as such be disregarded. Whart. Cr. P. and P., Sec. 158.

All unnecessary words may, on trial or arrest of judgment, be rejected as surplusage, if the indictment would be good upon striking them out. Whart. Cr. Ev., Secs. 138, 139; 1 Bish. Cr. Proc., Sec. 478.

The same rule has been repeatedly recognized in this State. *State vs. Minau*, 37 An. 526; *State vs. Johnson*, 30 An. 305; *State vs. Crittenden*, 38 An. 448.

IV.

Ever since *Strouderman's case*, 6 An. 286, it has been uniformly held, in this State, that it is the duty of counsel to show by his bill of exceptions that he asked for instructions to the jury that were material, and that he did not require the judge to charge an abstract proposition of law. It is not possible for the Supreme Court to determine the applicability of the instruction unless the bill of exceptions contains a recital of the circumstances to which the law is to be applied. *State vs. Riculf*, 35 An. 770; *State vs. Daley*, 37 An. 576; *State vs. Melton*, *Id.* 82; *State vs. Ford*, *Id.* 464; *State vs. Tucker*, 38 An. 539.

In the absence of statutes providing otherwise, the judge is at liberty to disregard the requests for instructions which have been made, and to instruct a jury wholly in his own language. *Thomp. Trials*, Sec. 2351; *State vs. Ott*, 49 Mo. 326.

The court is not bound to give instructions precisely in the form or in the identical terms put by the counsel for the accused, but it

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is sufficient if such instructions are given to the jury as substantially embody the principle invoked, and state the law correctly upon the issues involved. *State vs. Riculfi*, 85 An. 770; *State vs. Porter*, *Ib.* 1159; *State vs. Durr*, 89 An. 751; *Thomp. Trials*, Sec. 2350; *Story, J.*, in *Olymer vs. Dawkins*, 3 How. (U. S.) 674, 688; and in *Pitts vs. Whitman*, 2 Story C. C. 609, 620.

The District Judge had already correctly charged the principle of law invoked in the instructions requested, and had recognized "a marked and clear distinction between artifices used to detect persons suspected of being engaged in criminal acts, and means used to tempt them to adopt such acts," and that while "it is legitimate to adopt such measures as may be deemed necessary to detect crime," nevertheless, the means used for the purpose must not "amount to a practical inducement or solicitation to commit it." And the jury had been admonished that "though a great degree of objection or disfavor may attach to him (the apparent accomplice) for the part he has acted as an informer, or on other accounts, yet his case is not treated as the case of an accomplice." 1 *Greenl. Ev.*, Sec. 382 and (n.); 1 *Russ. Cr.* 26; 1 *Tayl. Ev.* 332; 1 *Am. and Eng. Ency. Law*, 65; *Whar. Cr. Ev.*, Sec. 440; 1 *Biah. Cr. Proc.*, Secs. 1169, 173, 174; *St. Charles vs. O'Malley*, 18 Ill. 407, 412; *State vs. McKean*, 86 Iowa, 343; *Com. vs. Wood*, 11 Gray (Mass.), 85; *Com. vs. Boynton*, 116 Mass. 343; *And. Law Dict.* 15.

It is not error upon the part of the trial court to refuse to give an instruction, however faultless in point of law, when the same, in substance, has already been given. 10 An. 264; 14 An. 461; 23 An. 8; 25 An. 407; 27 An. 698; 28 An. 65; 30 An. 1176; 31 An. 302; 32 An. 1270; 33 An. 537; *Ib.* 679; 35 An. 775; *Ib.* 970; *Ib.* 1180; *Ib.* 1159; *Ib.* 1058; 36 An. 81; 37 An. 77; 38 An. 202; *Ib.* 459; *Ib.* 795; 41 An. 317; *Ib.* 600; *Ib.* 780.

It is everywhere held by the courts that while an original solicitation or instigation to commit crime will not be countenanced, yet where the defendant has formed a guilty intent to commit the crime, any person may furnish opportunities, and even lend assistance to the criminal with the commendable purpose of exposing and punishing him. And the fact that there existed a plot to entrap him will not affect the criminality of his act

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or render him any less liable to punishment. *Grimm vs. U. S.*, recently decided by the United States Supreme Court; 1 Bish. Cr. Law, Sec. 262; *U. S. vs. Whittier*, 5 Dill. 85; *Rex vs. Exgington*, 2 Bos. and Pul. 508; *Rex vs. Ady*, 7 Car. and Payne, 140; *Rex vs. Holden*, 2 Taunton, 384.

The rule of law laid down in these decisions is substantially that formulated by the trial judge in his general charge.

As we have already had occasion to maintain, it is not correct to instruct the jury that "accomplices are all those who take part or participate in the commission of an unlawful act, whether before or at the time that it is committed." This definition would include every apparent or feigned accomplice. The participation must be in the criminality of the act either as a principal or as an accessory. The accomplice is one who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime; and the test is whether the participant in the act can be indicted for his connection therewith. *Whart. Cr. Ev.*, Sec. 440; 1 Bish. Cr. Pr., Sec. 1159; *And. Law Dict.* 15; *Com. vs. Wood*, 11 Gray (Mass.), 85; *Com. vs. Boynton*, 116 Mass. 343; *Polk vs. State*, 36 Ark. 126; *People vs. Bolanger*, 71 Cal. 20; 1 Russ. Cr. 26; 4 Bl. Com. 34, 381.

The feigned accomplice does not need corroboration. His case is not treated as the case of an accomplice. 1 Greenl. Ev., Sec. 382; 1 Tayl. Ev., Sec. 971; *Whart. Cr. Ev.*, Sec. 440; *And. Law Dict.* 15; *Rex vs. Despard*, 28 How. St. Tr. 489, per Lord Ellenborough; *State vs. McKean*, 36 Iowa, 363; *People vs. Farrell*, 30 Cal. 316; *People vs. Barrie*, 49 Cal. 342.

Special instruction No. 8. was: "The court further charges the jury that it is dangerous to convict an accused upon the testimony of an accomplice who is not corroborated by other evidence."

This was refused by the trial court because (1) Sherman was not an accomplice; (2) that conceding Sherman to be an accomplice, to require corroboration or not was discretionary with the judge.

In *Russel's* case the Supreme Court declared the doctrine to be that whether the judge shall enforce as a rule of practice the requirement that the testimony of an accomplice be corroborated lies in his discretion, and in its application much depends upon the nature of the offence and the extent of the witness' complicity. 38 An. 138; *Fisher's Digest*, 563.

While it is discretionary, in this State, with the trial judge to determine whether he will charge that it is unsafe to convict upon the uncorroborated testimony of an accomplice, yet the evidence of a feigned accomplice will never require corroboration. See authorities cited *supra*.

V.

THE ORAL "ADDITIONAL INSTRUCTIONS."

It did not appear from the minutes that a written charge had been requested, and the record establishes that at the time the cautionary remarks were orally addressed to the jury the judge was ignorant that such a request had been made.

The declarations of counsel that the request was verbally presented are accepted as unimpeachable.

The remarks complained of are substantially set out in the body of this brief, and are copied in full into the "transcript of appeal."

In their brief, in treating of this subject, counsel for defendant say:

"There is one matter, however, which we press upon the attention of this honorable court. It relates to 'additional instructions' which were orally given to the jury in the absence of defendant's counsel. We do not complain that they were given to the jury in the absence of counsel for the accused; we say, however, that these instructions were given 'orally,' after a formal request had been made to charge the jury in writing; moreover, that they were coercive of the verdict in the case."

This sets out the entire burden of their complaint.

(a) *That the remarks were delivered orally.*

There was no denial of a right by the judge, but simply an entire ignorance that the request for a written charge had been made.

"It is a general rule that a party loses his right to complain, in an appellate court, of an interlocutory error committed by the court in the trial of the case, unless he makes his objection and reserves his bill at the time." *Thomp. Charg. Jury*, 156.

The reason is that the court is entitled to an opportunity to correct any error inadvertently committed at the trial, and a party should not be permitted to seek relief by appeal when the omission might have been prevented by objecting at the proper time.

Objection to the charge being oral, instead of written, must be made at the time the instructions are given; if not, the error will be

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regarded as waived. 11 Am. and Eng. Ency. Law, 263; State vs. Sipult, 17 Iowa, 575; Vanway vs. State, 41 Tex. 689.

Charges to the jury will not, in this State, be reviewed by the Supreme Court, unless they were in writing, and the defendant excepted thereto at the time they were given. State vs. Curtis, 34 An. 1213; State vs. Sheard, 35 An. 543; State vs. Mangrum, Ib. 619; State vs. Riculfi, Ib. 770; State vs. Bird, 38 An. 497.

Oral remarks made by the judge after giving his charge in writing, and which are not complained of as erroneous, will not be considered when not objected to at the time they were addressed to the jury. State vs. Outs, 30 An. 1115; Thomp. Charg. Jury, 105.

None of the admonitory remarks of the judge made during the absence of defendant's counsel can, by any reasonable interpretation, be looked upon as conveying to the jury any knowledge upon a question of law. They did not, therefore, constitute "a charge" within the meaning of the statute which requires a judge to deliver his charge to the jury in writing at the request of the counsel of either party. R. S., Secs. 991, 1966; 2 Thomp. Tr., Sec. 2880.

On the subject of giving oral instructions in violation of a statute which requires that they be given in writing, it has been justly observed: "If oral instructions should be given, and it could not be ascertained what they were, * * * it would be a cause for reversing the judgment. But if they are preserved in the bill of exceptions, and it appears they * * * did not at all affect his rights as a suitor, it would be difficult to find a ground upon which to place such a construction of the statute as would overturn the judgment." 10 Mo. 488, 487; Thomp. Tr., Sec. 2879.

That a verdict will not be disturbed where the error complained of in the charge to the jury could not have prejudiced the defendant, has become consecrated in the practice of our courts. 35 An. 1103; 34 An. 959; 33 An. 889; 32 An. 621; 28 An. 170; 8 An. 109.

(b) *That the instructions were coercive.*

The judge admonished the jury as follows: "It is exceedingly important, gentlemen, that you should find a verdict one way or the other. A great deal of time has, it is true, been consumed,

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but for various reasons it is exceedingly desirable to agree as soon as possible. The court has no disposition to coerce the jury, or to be harsh or disagreeable. You are all gentlemen of intelligence; suppose you should try again, say for half an hour." (Here Judge Ferguson reflected a few seconds, and then said): "Suppose you try once more. * * * This is a case of great importance. If it were an ordinary case I should discharge the jury and order a mistrial to be entered, but I can not do so without mature deliberation in the present case. Suppose you try once more to agree, in view of the importance of the case."

Not only are such cautionary remarks considered as not having a tendency to coerce, but rather to quicken the intelligence of the jurors and the sense of their obligations to give true deliverance on the evidence before them, but they are held to have always been regarded as a matter within the discretion of the court, and not as giving rise to an error affecting the result. This conclusion was reached by the Supreme Court of this State in an extreme case in which they were not "able to approve of the expressed determination of the court to keep the jury empannelled until a verdict was reached." *State vs. Green*, 7 An. 518, 520.

Commenting on a similar objection, Mr. Thompson caustically declares: "There seems to be no end to the fantastic questions which the ingenuity of lawyers will bring before the courts of error for their decision. When we consider the rigor with which, under the old law, judges kept juries together until they should agree, we can scarcely credit that it was assigned for error that the judge urged the jury to agree upon a verdict, etc." *Thomp. Tr.*, Sec. 2302.

The case which gave rise to these observations was *Allen vs. Woodson*, in which, in the language of Judge Thompson, "the Supreme Court did not notice the point in its opinion; but the official syllabus, prepared by the judge who delivered the opinion, recites that it was overruled." 50 Ga. 58, 70.

He adds this in a note to the last edition of his work: "The Supreme Court of Michigan were obliged to rule the same point in *Pierce vs. Rehfuess*, 35 Mich. 58. To the same effect see *State vs. Rollins*, 77 Me. 380." *Thompson Tr.* 1658 (n.).

The right of the trial judge to admonish the jurors that they should

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not, through sheer stubbornness and pride of opinion, decline, without reason, to yield; but should, on the contrary, listen to the views of their fellows in arriving at an honest verdict is sanctioned and approved by the highest authority as absolutely sound, and in so far as patient and exhaustive research can discover, has never been successfully disputed in the courts. 1 Bish. Cr. Pro., Sec. 982; Thomp. Tr., Sec. 2303; Com. vs. Tuey, 8 Cush. (Mass.), 1; Clem. vs. State, 42 Ind. 420, 438; State vs. Smith, 49 Conn. 376, 386; Swallow vs. State, 20 Ala. 30; The State vs. Bybee, 17 Kan. 462.

Charles Louque and James C. Walker for Defendant and Appellant:

That Charles Sherman is an accomplice of the defendant appears on the face of the indictment, and on the face of the statute under which the information or indictment was framed. Sec. 1, Act 78 of 1890; Constitution of Louisiana, Art. 173, and from the fact that he was so considered by the trial judge in his charge to the jury. Callahan's Case, 47 An. 444.

Therefore his testimony can not be "bolstered up" by proof that he made a "previous statement" to Henry Lochte out of the presence and hearing of the accused. Middleton vs. State, 52 Ga. 527; Joy's Ev. of Accomplices, 85.

Evidence to corroborate an accomplice must relate to some portion of the testimony which is material to the issue, in the sense that it connects or identifies the accused with the commission of the crime. Commonwealth vs. Bosworth, 22 Pickering, 397; Com. vs. Larrabee, 99 Mass. 413; Com. vs. Elliott, 110 Mass. 104; Com. vs. Stone, 11 Mass. 411; Com. vs. Scott, 123 Mass. 222; Com. vs. Holmes, 127 Mass. 424; Childress vs. State, 52 Ga. 106; Watson vs. Com. 95 Pa. 424; Rex vs. Farlow, 8 Car. and P. 106; State vs. Ohioyk, 92 Mo. 395; People vs. Elliott, 5 N. Y. 204; Boyce vs. People, 55 N. Y. 545; Armstrong vs. People, 70 N. Y. 38; People vs. Platt, 100 N. Y. 593; 3 Rice Crim. Ev. 325; Greenlief 381; 1 Phillips Ev. 30; "Callahan's Case," 47 An. 444.

The testimony of an accomplice can not be confirmed except by evidence from a purer source. 1 Bishop, 1170; State vs. Mason, 38 An. 476.

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The State has treated the witness, Charles Sherman, as a guilty accomplice, by so charging him to be in the indictment or information, and should not be permitted to "shift her position at will to a contradictory one to defeat the action of the law upon it," by maintaining that he was not an accomplice at all, or only a feigned accomplice, to admit proof that he made a "previous statement" to Henry Lochte. Gridley vs. Conner, 4 An. 417; Denton vs. Erwin, 5 An. 22.

The State is firmly bound by her judicial declarations in the information or indictment that "the bribe was feloniously and corruptly given by the witness, Charles Sherman," thus fixing his status as a guilty accomplice; and, therefore, the State is forbidden by the law from contradicting the statement thus made. Farrar vs. Stacey, 2 An. 211; Gridley vs. Conner, 4 An. 416; Durham vs. Williams, 32 An. 962; Gilmore vs. O'Neal, 32 An. 979; Dickson vs. Dickson, 33 An. 1370. "And this doctrine is so firmly sanctioned, both by reason and justice, that our courts have unhesitatingly extended its operation to the State itself." State vs. Taylor, 28 An. 460; State *ex rel.* Morgan, 28 An. 121; State vs. Ober, 34 An. 360; Folger vs. Palmer, 35 An. 744.

It deserves consecration as a maxim of law, honorable to human nature, that no accused should be convicted by other than legal evidence.

When the court's charges to the jury are confused and contradictory, it is ground for reversal, as where the trial judge charges the jury that it is incumbent upon the State to prove, beyond a reasonable doubt, that the witness, Charles Sherman, feloniously and corruptly gave a bribe to the accused, in order feloniously and corruptly to induce him to perform his official duty with partiality and favor; and then again instructs the jury that it matters not whether the said Charles Sherman so acted, or that he acted merely with a view to secure the detection of the accused.

Where instructions of such character, inharmonious and misleading, are given, it is sufficient reason for reversing a judgment. Prof. Jury Tr., Sec. 345. "It is held that the court errs when giving instructions apparently conflicting, leaving the jury to conjecture which of them should be applied to a given state of facts." Clem. vs. State, 31 Ind. 480; Note to Prof. Jur. Tr., Sec. 345.

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"It is of the first consequence in every case that the principles of law applicable thereto should be so plainly stated to the jury that they are thereby enabled to comprehend them." *Watkins vs. Wallace*, 19 Mich. 57.

Bribery is, so to speak, in the nature of a contract of hiring, in this, that one person pays to another a corrupt price to perform a corrupt service in his official character.

According to Act No. 78 of 1890 and Art. 178 of La. Con. 1879, to constitute the crime of receiving a bribe, there must co-exist on the part of the giver of the bribe, and on the part of the receiver of the bribe, a felonious and corrupt intent by one to induce the other to perform official duty, and by the other to be corruptly induced to perform such duty.

The words "so receiving," in Sec. 1 of Act 78 of 1890, evidently relate back to the words of the section with regard to the person who "shall give any sum of money, bribe, present or reward," etc. *Callahan's Case*, 47 An. 444.

Thus, the words "so receiving," by reasonable intendment, provide that to constitute the crime, the bribe must have been given and received with corrupt intent.

It is appropriate and pertinent to the law and facts of the case to ask the court to define to the jury that accomplices are all those who take part in committing an unlawful act, etc., and it is error to refuse to so instruct the jury, on the ground that it is a request to charge a mere abstract proposition of law, when the indictment or information distinctly charges that there was an accomplice in the crime charged.

It is error to refuse to charge the jury that it is dangerous or unsafe to convict on the uncorroborated testimony of an accomplice, and at the same time to instruct them that apparent accomplices need not be corroborated.

Where a special charge requested by counsel for the accused is correct in point of law, pertinent to the law and evidence of the case, and does not assume that facts have been proved, the jury should be so instructed by the court. *State vs. Abe Thompson*, 45 An. 969; *State vs. Tucker*, 38 An. 789.

When a request is made by counsel for the accused that the judge charge the jury in writing, such request applies to whatever additional instructions the court may consider proper to give to

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the jury, and it is error to so instruct the jury otherwise than in writing. The law, R. S. 1966, is mandatory in this respect, and is to be strictly construed. The giving of oral instructions, after such request, is ground for reversal. See Thomson Tr., Sec. 2375; Am. and Eng. Ency., Vol. 11, pp. 261, 283; State vs. Gilmore, 26 An. 599; State vs. Porter, 85 An. 535.

"The law-maker must have attached value to the right, or he would not have been at pains to pass the law conferring it; * * * at all events the right is clear, the duty of the judge absolute, and the denial is error." Fenner, J., in 85 An. 535.

"The privilege of requiring a written charge is unqualified and absolute. We can not, therefore, be abridged by any rule or *dictum* of the court; as the law does not authorize the judge to make any rule on this subject, we can not delegate to him any power in this respect. The judge was bound to give the written charge asked. He has erred in refusing to do so. This is enough to set aside the verdict, annul the sentence, and remand the case. Bermudez, C. J., *Ibid*.

When the jury are sent for by the judge and brought into court a second time, having failed to agree, without any request on their part for additional instructions, it is cautionary and paternal, but not consistent with law and approved practice, for the trial judge to advise them not to be stubborn and hold out to the end because of their private opinions, but to yield of their opinions to others, etc. Such instructions, aside from being oral, are coercive of the verdict, and invade the province of the jury, especially when they are sent back to deliberate half an hour longer, and are then locked up for the night of the tenth day of a protracted trial.

Argued and submitted, March 30, 1895.

Opinion handed down, May 6, 1895.

Rehearing refused, June 3, 1895.

The opinion of the court was delivered by

MCENERY, J. The accused was a member of the City Council of New Orleans. One Sherman had pending before the Council an application to be permitted to open a barroom in his place of business. The ac-

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cused made a proposal to him that for one hundred dollars he would secure him the privilege asked for. Subsequent to this proposal, Sherman, O'Malley, Sergeant Aucoin of the police force, and some newspaper reporters arranged a plan to entrap the accused. The plan was successful. Marked money, to the amount of one hundred dollars, was tendered to the accused, in response to his proposal, by Sherman, and he accepted it.

The other parties were secreted and witnessed the transaction. There is a contention that Sherman was an actual accomplice, and not a feigned accomplice.

The judge's charge to the jury, and the admission of testimony, were based on the theory that the witness and prosecutor, Sherman, was an apparent or feigned accomplice. This question is disposed of in the discussion of bill No. 2. We will, as we have ascertained from the evidence in the record that the man Sherman was a feigned accomplice, treat him in discussing the following bills as an ordinary witness.

Before doing so, however, we will notice that part of defendant's complaint to the inconsistency of the judge's instructions to the jury.

In one part of the charge the trial judge says that if the giver of a bribe acted merely with a view to secure the detection and conviction of the accused, and the latter accepted the bribe with the intent to be influenced thereby, he is guilty, and the other part of the charge is that the State must establish beyond a reasonable doubt, all the material averments in the indictment, to-wit: * * * "That the defendant, a member of the City Council and a municipal officer, in such capacity, received one hundred dollars from Sherman as a bribe, present and reward, which was corruptly given to him by said Sherman."

Here were two charges on two different theories of the case, one by the State, that Sherman was a feigned accomplice, and the other by the accused, that he was an actual accomplice under the averments of the indictment. We think the charge is not objectionable; certainly, it did the accused no injury, as it was based on the theory of his defence.

Bill No. 1 in the record has reference to the testimony of one Henry Lochte. Considering Sherman to be an ordinary witness, Lochte's testimony is objected to on the ground that it was the

statement of a collateral fact, and in no way connected with the act of bribery committed on the 29th of August, 1894, and in no way tended to confirm the testimony of Sherman, and was irrelevant and heresay.

The testimony of this witness is to the effect that some five days prior to the date of the offence with which the defendant is charged, Sherman, the prosecuting witness, said to him that the defendant wanted one hundred dollars to get him, the witness, a permit to run a barroom in his place of business; that he told the witness that the proper place for him to go was before the grand jury. Sherman said he would go, but he first wanted to get his permit. After the arrest of defendant, he saw Sherman in company with one O'Mally at his store, and the visit of these men was to see about the proposition made to him by Dudoussat.

For the admission of this testimony the trial judge assigned as a reason that fabrications, improper motives and prevarication had been imputed to the witness Sherman, and on the ground that Sherman was an apparent accomplice, he permitted the testimony to be received to confirm the statements of the witness Sherman, which had been assailed, those statements being prior to and were similar statements made by the witness, and made at an unsuspicious time.

"Where the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is but proper that such evidence should be rebutted." Whart. Crim. Ev., Sec. 492.

The case of *State vs. Cady*, 46 An. 1847, sustains this doctrine. In this case the general character of the witness was not attacked for truth and veracity, but particular facts were charged as false and fabricated. Hence it was competent to show that at a time unsuspicious he made similar statements as to the facts contradicted.

But we think under the facts of this case the evidence was material and important, and had direct bearing upon the issues presented, and were, in fact, a part of the transaction, to understand which it was essential that these facts should have been narrated.

If the "trap" prepared and arranged by the witness Sherman, O'Malley and certain newspaper reporters and a sergeant of police, to procure evidence of bribery against the witness stood alone, it

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would at once appear that it was an inducement, an opportunity offered, and a temptation presented to commit the crime. The defendant, under such a state of facts, would have been entitled to a verdict of not guilty.

It was essential therefore to show that the defendant proposed to commit the crime, and the means employed were not used as an inducement or temptation, but for the purpose of securing the evidence. From the testimony embodied in the bills of exception it appears that the defendant had made up his mind to commit the offence, and had made a proposition to the witness that for one hundred dollars he would, in his official capacity as councilman, procure him a permit to conduct a barroom. The application for the license was pending when the trap was laid. These matters had been sworn to by Sherman. They were contradicted as being fabricated. There can be no doubt, therefore, that prior statements similar to those made on the trial, made at an unsuspecting time, were legal and competent testimony, and were, in fact, a part of the transaction necessary to disclose, in order to convict the defendant.

We are not disposed to commend the means employed in this particular case, and, under the circumstances, they were of such character as to leave but little discrimination between prosecutor and accused. The defendant might have escaped disgrace if the opportunity had not been presented. But he had proposed to commit the crime, and seized the opportunity presented to do so.

Bill No. 2 was reserved to a portion of the written charge, and is to the effect that the charge was erroneous, as it did not instruct the jury, that to constitute the crime of receiving a bribe there must co-exist on the part of the giver and receiver of the bribe a corrupt intent—one to influence the other, and the other to be influenced to vote or to exercise official power or perform official duty with partiality or favor. The bill, in effect, denies that there can be a feigned accomplice in bribery, and, therefore, the theory upon which the conviction was had is incorrect. The indictment charges as though the prosecuting witness was an accomplice. The charge as to him may have been groundless; he may be innocent of the charge, but the question is, was the charge properly made against defendant. In other words, could he commit the crime of bribery without the co-operation of the defendant? Was the joint act of both necessary?

The statute defining the offence is in the language of the article of the Constitution. It has a dual capacity. It charges two acts, and affixes to them the same designation and gives the same description, and imposes the same penalty; yet they are each distinct offences.

An analysis of the article of the Constitution and Act No. 78 of 1890 will show that it is made an offence to give a present or reward to any officer of the State or of a municipality with the intent to influence him in the discharge of official duty. Any officer so receiving such reward or present is also charged with the same offence—bribery. They are intimately associated, it is true, and the words *so receiving* would at first reading incline one to the opinion that there necessarily must be co-existent the giving and taking with the intent charged in the statute. The giver may tender with the intent to corruptly influence, and the acceptor may receive without such intent—the present or reward. Unquestionably, the giver would be guilty of a violation of the statute. And so the acceptor may take a present innocently tendered, yet if it should be proved that it influenced his official action, he would also be guilty of a violation of the statute.

We are of the opinion that the statute does not require a mutual or reciprocal agreement to commit the crime of bribery.

Bill No. 3. After the judge had charged the jury, twelve additional special charges were tendered to him, which he refused, and gave his reason for refusing each special instruction. Special charge No. 1 was refused because the trial judge had in substance given the same in his general charge. This was sufficient. When he correctly announces the law in his own language, he is not required to give the same instructions to the jury in the language of counsel.

Nos. 2 and 3 have been passed upon by this court, and No. 4 has been passed upon in this opinion. The refusal to charge as requested in No. 6 is stated by the judge to be that he had already charged that there was a marked distinction between artifices used to detect persons suspected of being engaged in criminal acts and means used to tempt those to commit such acts. In his charge, the judge stated, "it is legitimate to adopt such measures as may be deemed necessary to detect crime, provided the means used do not amount to a practical inducement or solicitation to commit it." This instruction is supported by the authorities. Under the evidence introduced it was competent for a jury to determine whether the

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accused was a feigned or an actual accomplice. The record shows all the facts necessary to form a conclusion on this point went to the jury. The special instruction, therefore, was properly refused. No. 7 is practically the same as above. Nos. 8, 9, 10, 11 and 12 relate to the corroboration of the testimony of accomplices, which has already been disposed of. The general charge in all matters referred to therein, and to which the special charges alluded, covered all the matter, not so much in detail, but sufficiently in substance, to intelligently inform the jury of the law applicable to the case. Those which were refused have been fully discussed herein, sustaining the trial judge in his ruling.

Bill No. 4. The defendant asked a witness: "What did Sherman, the prosecuting witness, or one of the witnesses of the State, say about his father and mother," to show that the prosecuting witness was not named Sherman, but that he had assumed said name to cover up his identity and to discredit his general reputation. The question was objected to by the District Attorney and the objection sustained. The evidence was irrelevant and immaterial, and the ruling was correct.

There is nothing in the motion for a new trial to attract our attention except the oral instructions of the judge to the jury, who came into court, on failing to agree, and these oral instructions were then given. The counsel for the accused were not present. They were looked for but could not be communicated with. It was not essential that they should have been present.

It appears that in the early stage of the case the attorneys for the defence had requested a written charge. This was given as requested. When the jury returned into court, in the absence of a bill of exception reciting the oral charge, we will presume that the judge only reiterated what was in his written charge.

It does not appear that any instructions as to the law in the case were given to the jury.

The oral instructions were simply in reference to the jury's inability to agree upon a verdict. The judge told the jury that it was exceedingly desirable that they should agree as soon as possible, and that the court had no desire to coerce them; that jurors were sometimes stubborn and held out to the end, assigning no reasons for their stubbornness; that he hoped the jury possessed no such feeling. Some jurors might think it humiliating to yield their opinion,

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but they should listen to the views of others and arrive at an honest verdict. If it were an ordinary case he would order a mistrial, but as the case was one of importance he would not do so without mature deliberation. We fail to perceive any coercion of the jury, or any wrong inflicted upon the defendant, or any reason why there should be a new trial because of the absence of defendant's counsel at this interview between judge and jury. *State vs. Green*, 7 An. 518.

If a case should occur where the trial judge should force a verdict against the accused by prolonging the deliberations of the jury beyond a reasonable period, imposing upon them physical suffering and endangering their health, it will be time for an expression of opinion as to the relief prayed for by the defendant. The instant case affords no opportunity for an expression of an opinion on this subject.

The witness, Sherman, was indicted as an accomplice. The defendant's counsel urge that this operates as an estoppel, and the State can not deny that fact, and that the introduction of evidence and the rules applicable to the same must be governed by this fact.

We know of no law which applies the doctrine of estoppel in criminal trials. The State might indict A for the murder of B. A might be acquitted. This would not estop the State from punishing C, the real criminal.

Judgment affirmed.

CONCURRING OPINION.

MILLER, J. The defendant contends the lower court erred in permitting the testimony of Lochte to go to the jury as corroborative of that of Sherman, who had testified to the defendant's guilt. It is urged on us that the corroborative testimony was as to an important point, and had no tendency to sustain any testimony of Sherman as to the guilt of the prisoner. It is, we presume, conceded the testimony received was of that species of corroboration admitted in the case of the ordinary witness whose veracity has been assailed. 1 *Greenleaf on Evidence*, Sec. 469; 1 *Roscoe Criminal Evidence*, S. P. 185 and note. Such corroboration is excluded in the case of the accomplice, and that exclusion we applied in the *Callahan* case (47 An. 444). 22 *Pickering*, 397; 127 *Mass.* 424. The defendant's contention is, Sherman was an accomplice, and hence the same rule applied in the *Callahan* case is to be enforced here. It is

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insisted the indictment treated Sherman as an accomplice. By this is meant the indictment against defendant charged the bribe was given by Sherman. But this, in our view, did not exclude testimony he was a feigned accomplice. So, again, in portions of the charge Sherman was treated as an accomplice. But it is none the less true, that testimony tending to show his complicity was only feigned, was submitted to the jury, and, notwithstanding the charge, it can not be denied that the complicity of Sherman, whether feigned or not, was an issue for the jury. It is manifest, that in order to treat Sherman as a guilty accomplice, we must determine the issue of fact, and without such determination, the rule of the Callahan case can not be applied by us. We have no power to deal with the issue of fact. Constitution, Art. 81. My conclusion is, we can not apply a rule of exclusion of testimony, when, as in this case, the application of that rule involves an issue completely withdrawn from our jurisdiction. The difference is obvious between this and the Callahan case. There it was conceded the witness to be corroborated was an accomplice in the fullest sense. The law exacted a certain kind of corroborative testimony and prohibited any other. We enforced the law. Here, the guilty complicity of Sherman is put at issue by argument and testimony laid before the jury. The distinction between the accomplice and feigned complicity is recognized. When a feigned accomplice, the corroboration is not that required to sustain the credit of the ordinary accomplice. 1 Greenleaf, Sec. 382. This disposes, in my opinion, of the defendant's first bill.

On another point exhibited by the bills, in my view, the Act No. 78 of 1890, as to bribery, is divisible as to the offence of bribery. The party who receives a bribe with the corrupt intent defined in the statute is guilty, irrespective of the intent of the giver. In my view, the statute plainly marks the distinctness of the offences. I think, in this respect, there was no error in the charge of the court.

The other questions arising in the case are discussed in the opinion of Mr. Justice McEnery.

I concur in the decree.

DISSENTING OPINION.

I.

WATKINS, J. The first objection, I think well taken by defendant's counsel, is that which relates to the admissibility of the

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testimony of Henry Lochte. It was offered on the part of the State for the avowed purpose of confirming the truthfulness and general veracity of one Charles Sherman, the only witness by whom the *corpus delicti* was proven. This testimony was offered in rebuttal, after the close of the defendant's evidence; and by it, the State proposed to show that Sherman had made to him, Lochte, on several occasions prior to the defendant's commission of the crime charged, similar statements to those he had made in the course of his examination in chief as a witness.

To this testimony the defendant's counsel objected on the following grounds, viz.:

1. That the witness' testimony did not tend to corroborate the veracity of Sherman; and that for that purpose it was incompetent, immaterial and inadmissible.

2. That it was hearsay, irrelevant, and made out of the presence and hearing of the defendant.

3. That it was inadmissible for the purpose of sustaining and confirming the truthfulness of Sherman, because it does not tend to confirm his testimony upon a point material to the issue, in the sense that it tends to prove the guilt of the accused, or to connect him with the commission of the crime charged.

4. That the testimony of Sherman proves that he is an accomplice of the accused.

These objections having been overruled, and the testimony permitted to go to the jury, the counsel for the defendant excepted and reserved a bill of exceptions.

The judge assigned as his reasons for admitting the testimony: (1) That it was competent for the State to establish by the testimony of a disinterested third person that Sherman had told him that the defendant had agreed to obtain for him a barroom privilege for one hundred dollars; (2) that the statement of Sherman to Lochte was made four days previous to the alleged crime—at a time not suspicious; (3) that improper motive, recent fabrication and prevarication were imputed to the witness, Sherman, on the trial of the case; (4) that the evidence adduced showed, at most, that he was only a feigned accomplice; (5) that, in his opinion, it was competent to show by the witness, Lochte, that Sherman had stated to him that the defendant had proposed to be bribed in the manner by him related as a witness, several days prior to his actual com-

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mission of the crime charged—in other words, to show by the witness, Lochte, that Sherman had made a prior similar statement to him before the existence of his imputed purpose to misrepresent.

The purport of the judge's ruling is, that the witness, Sherman, was not a guilty, but a feigned accomplice, uninfluenced by any criminal intent, in so far as any participation in the crime was concerned. That improper motive, recent fabrication and prevarication were imputed to him on the trial, and it was competent to show, by a disinterested third party, that he made a prior similar statement at a time not suspicious.

The interrogation and responses of the witness, Lochte, are as follows:

Q. Was there any conversation at the time with reference to his (Sherman's) petition for a license to operate a barroom?

A. Yes, sir.

Q. What was it that passed between you in that conversation?

A. Mr. Sherman told me that Mr. Dudoussat wanted one hundred dollars to get him a permit to run a barroom at his place of business.

Q. Did you say anything to him?

A. I told him the proper place for that was for him to go before the grand jury.

Q. What was his answer?

A. He said that he would, but he wanted first to get his permit.

Q. That he would go, but that he wanted first to get his permit?

A. Yes.

The following is a portion of the interrogation and responses of Sherman in the course of his examination in chief, viz.:

Q. What was this one hundred dollars given to him for?

A. To have him get my barroom privilege, sir.

Q. Did you know what position he occupied?

A. Well, I could not say what his position was. I thought I would give him this one hundred dollars for the privilege for my barroom.

Q. Did you know whether he held any office?

A. Yes, sir; Mr. Dudoussat.

Q. What office did you know he held?

A. He was a council in the City Hall; a councilman.

Q. Did he make any promise with reference to your ordinance?

A. Yes, several times.

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Q. What was it he promised to do?

A. That he would get me my barroom privilege.

Q. Did he require you to do anything for the passage of the ordinance?

A. Yes, sir.

Q. What?

A. He told me that if I gave him one hundred dollars it would be all right, and the privilege he would get.

Q. That was the reason you gave him the money?

A. Yes; and he said he would work for it.

Q. He would work for what?

A. Work to get my barroom privilege from the council.

Q. For one hundred dollars?

A. Yes, sir; and I paid him for it.

The foregoing is quoted from the examination in chief of the witness, Sherman, on the part of the State, and with this statement his examination was closed, and he was surrendered to the defendant's counsel for cross-examination; and we make the following extracts therefrom, viz.:

Q. You know that place very well, the Jackson Brewery, don't you?

A. Yes, sir.

Q. How many times have you been there?

A. Four or five times.

Q. For what?

A. To see Mr. Dudoussat.

Q. When did you go there to see Mr. Dudoussat?

A. I can't say.

Q. Was it before or after the first petition was presented to the council?

A. Yes, sir.

Q. Before the first petition was presented?

A. Yes, sir.

Q. Did you have any ice-box belonging to the Jackson Brewery?

A. Yes, sir.

Q. Didn't you go there to see about that ice-box?

A. Yes, sir.

Q. How many times did you go there to see about the ice box?

A. I went there two or three times, because I was taking the

word of Mr. Dudoussat that he was going to get my privilege, and at the same time to make a short cut about my ice box.

* * * * *

Q. That was before you saw Mr. Dudoussat—before you saw him at all ?

A. No, sir; I saw Mr. Dudoussat before that, at my grocery.

Q. Before the first time that you went to the Jackson Brewery?

A. Yes, sir.

The witness, Sherman, then states all the circumstances of his visit to the City Council for the purpose of seeing Mr. Dudoussat with regard to the passage of the city ordinance granting him a bar-room privilege; and, also, the circumstances of the payment of the money to the defendant, stating that the plan was formed on the day before the payment, to entrap him, and capture him with the money in his possession.

On this state of facts, and at this stage of the trial, had the State a legal right to introduce Lochte as a witness, in rebuttal, and, by his testimony, seek to sustain the truthfulness of Sherman ?

That must necessarily depend upon whether he was a guilty or a feigned accomplice; for, if a guilty accomplice, the rule of exclusion, which was recognized in the Callahan case, should prevail.

Lochte's statement was "that Sherman told him that Mr. Dudoussat wanted one hundred dollars to get him a permit to run a barroom at his place of business;" and Sherman testified that Mr. Dudoussat "told him that if he gave him one hundred dollars it would be all right, and he would get his barroom privilege ?"

It is apparent that this statement of Mr. Dudoussat to Sherman was competent testimony, but it is equally evident that the repetition of that statement by Sherman to Lochte was the plainest kind of hearsay, as the statement was made out of the presence and hearing of the defendant. It is equally evident that it constituted no part of the *res gestæ*, because the conversation took place four days previous to Sherman's alleged payment of the money to Mr. Dudoussat, and three days previous to the arrangement which is alleged to have been made to entrap him.

"*Res gestæ* are events speaking for themselves, through the instinctive words and acts of participants, not the words and acts of participants narrating the events.

"What is done or said by participants, under the immediate spur

of the transaction, becomes thus part of the transaction, because, then it is the transaction that thus speaks. In such case it is not necessary to examine as witnesses the persons who, as participants in the transaction, thus instinctively spoke or acted," etc. (My italics.) Whar. Crim. Ev., Sec. 262.

"The distinguishing feature of declarations of this class is, that they should be the necessary incidents of the litigated act, necessary in this sense, that they are part of the immediate concomitants, or conditions of such act, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act, and become part either of the action immediately producing it, or of the action it immediately produces." *Ibid.*, Sec. 263.

But it is answered on the other side, that improper motive and recent fabrication of evidence against the defendant, and prevarication had been attributed to the witness, Sherman, on the trial of the case, and this entitled the State to sustain his character for veracity and truthfulness by introducing in rebuttal the testimony of a disinterested third person, to show that he (Sherman) had made to him a prior similar statement before the existence of his imputed purpose to misrepresent.

The defendant's counsel invoke their objection that Sherman is the guilty accomplice of Dudoussat, and for that reason his truthfulness can not be sustained by any testimony which does not tend to confirm his statement upon a point material to the issue in a sense that it tends to prove the guilt of the accused. To this, the reply of the prosecution is that, as the judge assigns, "the evidence adduced showed, at most, that Sherman was a feigned accomplice," and for that reason the rule applicable to sustaining the veracity of an ordinary witness applied.

Let me see, first, what that rule is:

What was the character of Sherman's impeachment which rendered sustaining evidence necessary?

The trial judge states, in his reason for admitting the objected testimony of Lochte, "that improper motive, recent fabrication and prevarication were imputed to Sherman on the trial."

Imputed to him, when and where?

By the testimony of Dudoussat, as a witness in his own behalf. No other means of imputation are anywhere suggested. When Dudoussat

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sat went into Sherman's grocery he went alone. No one other than he and Sherman participated in the transaction respecting the payment of the money. All of Sherman's confederates were upstairs, in a place for observation. Consequently there was, in the nature of things, no one other than Dudoussat in a position to impute to Sherman a recent fabrication of this story.

Is it true, as matter of law, that defendant's mere contradiction of Sherman's story, authorizes the introduction of hearsay testimony to sustain the truthfulness of his statement?

If so, then the defendant occupies an unfortunate situation; for, if he stands mute in the presence of his accusers, the impression of guilt is created against him, and if he denies their accusations, hearsay evidence becomes admissible as proof of guilt, by indirection.

Mr. Wharton says that a mere conflict of testimony, however, will not justify the introduction of evidence to back up the witnesses' statements thus conflicting. Nor can such testimony be received * * * merely upon proof of prior conflicting statements of the witnesses." Whart. Crim. Ev., Sec. 491.

That statement is in keeping with the jurisprudence of the country on the subject. State vs. Ward, 49 Conn. 429; Starks vs. People, 5 Denio. 106; Johnson vs. State, 21 Ind. 329.

The rule of exclusion not only applies to hearsay, but to any evidence. It goes to the extent of rendering any sustaining evidence inadmissible under that state of case.

Mr. Wharton fully explains the rule thus, viz.:

"When a witness is assailed, on the ground that he narrated the facts differently on a former occasion, while on re-examination it is competent for him to give the circumstances under which the narration was made, it is ordinarily incompetent to sustain him, by proof, that on other occasions his statements were in harmony with those made on the trial." *Ibid.*, Sec. 492.

But such is not the claim made in this case, but it is claimed "that improper motive and recent fabrication and prevarication had been imputed to Sherman on the trial of the instant case. Let that be conceded, and what is the rule? On this question Mr. Wharton says: "On the other hand, when the opposing case is that the witness testified under corrupt motives, or where the impeaching evidence goes to charge the witness with a recent fabrication of his testimony, it is proper that such evidence be rebutted." *Ibid.*, Sec. 492.

But it must be observed, that the author does not say that such impeaching testimony can be rebutted by means of hearsay evidence, as the State was permitted to do in this case. The contrary appears clearly from the illustration he gives. That when a witness on the trial of a case of perjury was shown to have made a false statement as a witness on the previous trial of a case of arson, "it was held, that as he had been thus discredited he might be sustained by showing that he had made to C., immediately after the arson, a statement in harmony with that made by him on the perjury trial, though the particulars of the statement were inadmissible." *Ibid.*, Sec. 492.

So, the rule permits a witness thus attacked to be sustained by proof of the fact that he had previously made "a statement in harmony" with his statement on the trial; but it excludes "the particulars of the statement," as wholly inadmissible.

To this effect is the statement of many decisions and text writers. Taylor's Evidence, Sec. 1830; 2 Phillips' Evidence, Sec. 445; 1 Starke's Evidence, 253; 3 Russell on Crimes, 593; Henderson & Jones, S. and R., 410; Cook vs. Curtis, 6 H. & J. 86; Solp vs. Blair, 68 Ill. 453; Coffin vs. Anderson, 4 Blackf. 395; State vs. Vincent, 24 Iowa, 570; State vs. George, 8 Iredel, 324; March vs. Hassel, 1 Jones, 329; People vs. Doyell, 48 Cal., 85.

Indeed, I am not aware of any well considered case in which this rule has been extended.

This question has been examined, and the rule, as announced by Mr. Wharton, maintained by this court.

In State vs. Guillory, 47 An. 31, quite a similar case was presented, and hearsay evidence was held inadmissible, for the purpose of sustaining the veracity of a State's witness, whose testimony has been impeached; and this court said that the reasons of the trial judge were "insufficient to justify this radical departure from elementary principles, in permitting the introduction of hearsay evidence."

The question was distinctly affirmed in State vs. Callahan, 47 An. 455.

So much for the admissibility of hearsay evidence to sustain the credibility of Sherman, as an ordinary witness. But defendant's counsel insist that he was a guilty accomplice, and that the rule of exclusion adopted in the Callahan case should be applied; while on the other hand it is insisted that he was only a feigned accomplice.

The discussion of this question resolves itself into two proposi-

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tions, (1) that, whether Sherman was a guilty or a feigned accomplice, was a question of fact for the jury to decide after hearing all the evidence, and not one of law for the court; (2) that, if it be one of law, primarily, for the court to decide, the record and the testimony that is annexed to the bill of exceptions demonstrate that Sherman really sustained the relation of a guilty accomplice to the accused, and that the judge committed error in admitting the evidence of Lochte to sustain his veracity as such.

(a) That it is a question of fact, the judge's assignment of reasons attest, for it relates that "the evidence adduced showed, at most, that Sherman was a feigned accomplice"—showing that he predicated his ruling on evidence adduced at the trial.

I am not aware of any opinion of this court in which this question has been decided, hence I will refer to the decisions of other courts as controlling the question in dispute.

In *State vs. McKean*, 36 Iowa, 343, a question arose in reference to the following charge to the jury, viz.:

"If, at the time of taking the horse, he was actuated by or possessed of such felonious intent, he was then to be regarded as an accomplice; but, on the other hand, if you are satisfied from the evidence that Meeks intended from the beginning to act the part of the detective, to ferret out and make known the crime and secret frauds of the defendant and others, then he is not to be regarded as an accomplice.

"The question of whether Meeks was an accomplice or a detective is important, and must be by you determined. * * *

"It is a question of fact which you are to determine from the evidence."

After making a careful examination of the authorities, the Iowa court said:

"We do not see how we can interfere with either the action of the court or jury."

The court cited *inter alios* *Rex vs. Despard*, 28 Howell's State Trials, 346, in which Lord Ellenborough, in summing up, said:

"But there is another class of persons which can not properly be considered as coming within the description, or as partaking of the criminal contamination of witnesses; I mean persons entering into communication with the conspirators, with the original purpose of discovering their secret designs, and disclosing them for the benefit

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of the public. The existence of such original purpose on their part is best evidenced by conduct which precludes them from ever wavering, or in swerving from the discharge of their duty, if they might be otherwise disposed to do so."

The authority of this last case appears to have been generally accepted; and it is recognized as having correctly stated the principal distinction between the guilty and feigned accomplice, as it has been repeatedly quoted approvingly by text writers. 1 Phillips on Evidence, p. 118; 1 Greenleaf on Evidence, Sec. 882.

The principles of the foregoing decisions have been followed with practical unanimity in the following cases, viz.: Commonwealth vs. Downing, 4 Gray, 29; Commonwealth vs. Willard, 22 Pickering, 476; Commonwealth vs. Wood, 11 Gray, 85; Commonwealth vs. Boynton, 116 Mass. 343; People vs. Smith, 28 Hun. (N. Y.) 626; Campbell vs. Commonwealth, 84 Penn. St. 187; Haughton vs. State, 86 Ala. 236; Smith vs. State, 37 Ala. 472; Wright vs. State, 7 Texas Ap. 574; People vs. Bolanger, 71 Cal. 19.

Sanctioning this principle Mr. Wharton states the rule thus briefly and comprehensively, viz.:

"Accompliceship is to be proved inferentially; the question is one of fact for the jury." Whar. Crim. Ev. Sec. 440; Commonwealth vs. Elliott, 110 Mass. 89; State vs. Schlagel, 19 Ind. 169.

On this citation of authority, it can with safety be affirmed, that whether Sherman was a guilty or a feigned accomplice was a question of fact for the jury to decide after hearing all the evidence, and not one of law for the court.

This is not denied, but on the contrary, affirmed by counsel for the State, as the following quotation from their brief will show:

"Whether Sherman was a feigned or whether he was a guilty accomplice, is not a question of law to be determined by the judge from an inspection of the pleadings, but one of fact to be found by the jury from the evidence."

"The character and relation of the witness, Sherman, to the case, can not arbitrarily be fixed and determined by the allegations in the indictment; *they must depend entirely upon the proof*. It is not what the State avers, but what the *evidence establishes that must determine the true condition of affairs*."

Such being the character of the issue tendered, it was not competent for the trial judge to consider and decide this question of fact,

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which properly belonged to the jury; and it is equally evident that this court can not undertake to consider and determine the question presented as one of law, in the face of all the authorities to the contrary. If this court were to undertake to decide, it would be compelled to segregate from the case and decide in advance of the verdict of the jury, a question of fact which was their exclusive province to decide. By thus deciding, the verdict of the jury would have been forestalled. This action of the trial judge resulted in giving to Sherman the *status* of a *feigned* accomplice before the case had been submitted to the jury.

The appellate jurisdiction of this court, in criminal matters, is restricted to questions of law alone. Const., Art. 81.

Therefore, we have not the constitutional power or authority to take from the jury and decide any question of fact of which they are rightfully judges.

That this was the effect of the trial judge's ruling, will appear from the brief of counsel for the State, thus:

"This constituted Sherman a feigned accomplice, not a real accomplice, and he was to be treated as an ordinary witness, as to whom it might be shown that he had made a prior statement similar to the one charged to have been made from a design to misrepresent."

Since State vs. Nelson, 82 An. 842, the constitutional power of this court to examine certain facts adduced on the trial, for the purpose of deciding questions of law thereon raised, has never been questioned.

For instance, testimony adduced after verdict, on a motion for a new trial. That adduced during the progress of the trial, for the purpose of showing the admissibility of dying declarations. That offered for the purpose of establishing the *overt* act, justifying the admission of proof of bad and dangerous character of the deceased.

But the jurisdiction of this court, in this respect, is limited to the consideration of evidence which is admitted in the *hearing of the judge alone*, and out of the presence of the jury; and same must be confined to *abstract, legal* questions, which are not to be submitted to and decided by the jury.

This question was again very thoroughly examined in State vs. Sieley, 41 An. 143, and in the course of our opinion we said that this court "has indisputable jurisdiction to examine and weigh the testi-

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mony of witnesses, in the consideration and decision of questions of law growing out of the principal issue in the case, and which are not submitted to the jury" (p. 145).

At the time these decisions were rendered, the opinion was regarded by some in the light of an innovation upon the constitutional prerogative of this court; and in no case has that latitude been extended or enlarged.

The principles announced in the Nelson and Siley cases were affirmed in State vs. Nash & Barnett, 45 An. 1187.

When the case last mentioned was again presented for our consideration, we were called upon to consider a certain ruling of the trial judge in which he employed this expression, viz.:

"The rulings in these two cases"—State vs. Nelson, 32 An. 842 and State vs. Sielly, 41 An. 143—"were made upon questions *purely collateral to the main issue*, upon the decision of which they had no bearing whatever. It did not require the court to go into an examination of any evidence touching the prosecution. * * * But when it proposed to *extend this rule* so as to embrace *evidence going directly to the merits; to proceedings arising in the course of the trial before the jury*," the judge said "we may well call a halt."

This ruling was approved by this court. State vs. Nash & Barnett, 45 An. 1187.

The evidence which the defendants were solicitous to have examined and passed upon by this court in that case related to an overt act of the deceased; laying a foundation for the introduction of uncommunicated threats, and making proof of the violent and quarrelsome character of the deceased.

Obviously that decision did not enlarge the principles of the Nelson and Seilly cases; but its direct and immediate effect was to restrict the same within a slightly narrower compass.

As it was a question of fact for the jury to decide, after hearing and considering *all* the testimony adduced, whether Sherman was a *guilty* or a *feigned* accomplice, how could the trial judge do otherwise than resort to a fair consideration of the *whole evidence* in deciding the same question? He could not stop short of this. If once decided by the *judge*, and upon the faith of his decision certain sustaining testimony was held admissible, what becomes of the question of *fact* for the *jury* to decide.

Should the jury entertain a different view from that of the judge,

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and decide that Sherman was a *guilty* accomplice, certainly the testimony of Lochte was altogether illegal and inadmissible. Therefore, the jury would be placed in the dilemma of feeling constrained to believe that Sherman was a *guilty* accomplice, and, at the same time, to convict Dudoussat on the *hearsay* statements of Lochte, sustaining his veracity as a *feigned* accomplice.

Can a ruling be sustained which will produce such absurd consequences? Surely not.

(b) Does the record and the emasculated portions of the evidence appended to the bill of exceptions disclose Sherman to have been a guilty or a feigned accomplice? Let us look at the record and testimony from this standpoint.

In the statute under which the defendant is being prosecuted, the *giver* and *receiver* of a bribe are equally within its denunciation.

That is equally so of the article of the Constitution, which the bribery statute closely follows. The charge of the information is, that the defendant did, feloniously and corruptly, *receive* a sum of one hundred dollars from one Charles Sherman as a bribe, present or reward; "*feloniously and corruptly given*" to the defendant "by the said Charles Sherman, *with the felonious and corrupt intent on the part of the said Charles Sherman,*" etc.

Sherman, as a witness for the prosecution, states that he gave to the defendant one hundred dollars "to have him get (for him) a barroom privilege." That the defendant promised him several times to secure the passage of a city ordinance granting him the privilege. It was for that reason he gave defendant the money.

In the course of his cross-examination he stated that he had visited the Jackson Brewery, where the defendant was employed, four or five times to see him. That this was before the ordinance had been introduced, and that he had gone there to see him about it. Said he had gone several times to the brewery, "because he was taking the word of Mr. Dudoussat that he was going to get his privilege for him." That he had seen the defendant on the subject, at his grocery, before he had seen him at the brewery.

Lochte testifies that he met Sherman, and had an interview with him, at his own place of business, four days prior to the giving of the bribe; and that, on that occasion, Sherman said the defendant wanted one hundred dollars for securing for him a barroom privilege; and he, Lochte, told him that he ought to take the matter before the grand jury.

That Sherman said "he would go, but that he wanted first to get his permit."

All of this is evidence, furnished by the prosecution, out of the mouths of State witnesses.

After all the witnesses had testified, and the case had been submitted to the jury, the judge charged the jury that "the State must establish that, while said petition was pending for consideration and action before said council, the said defendant, a member of the council, and a municipal officer, in his capacity, feloniously and corruptly received a certain sum of money, viz.: one hundred dollars, from said Charles Sherman, as a bribe, present and reward, which was feloniously and corruptly given to him by said Sherman."

All of these dealings and conversations took place some days—many of them several weeks—prior to the date defendant is alleged to have received the bribe. Throughout these transactions Sherman was confessedly *endeavoring to secure for himself a barroom privilege by means of a corrupt bargain with the defendant*. He went to the defendant's place of business to solicit and perfect their negotiations to that end, and defendant went to his grocery to see him on the subject before the ordinance was introduced.

In his conversation with his friend Lochte, the dialogue is both unique and significant. Lochte said to Sherman:

A. I told him the proper place for that was for him to go before the grand jury.

Q. What was his answer?

A. He said he would, but he wanted *first* to get his permit.

Q. That he would go, but he wanted *first* to get his permit?

A. Yes. (*My italics*).

It must be remembered that the agreement that is alleged to have been made between Sherman and his confederates, to concoct a plan for the defendant's capture with the bribe in his possession, was only formed on *the day previous to the commission of the crime*; and that all of the transactions related preceded it, days, and even weeks.

Is it not apparent that all of Sherman's acts, prior to this confederation, were those of *solicitation* and *inducement*, and that the definite, well defined and confessed object in view, on his part, was only to secure his barroom privilege?

Having, as he supposed, *succeeded in procuring* that, he entered into the conspiracy to secure his arrest, as an afterthought, possibly inspired by others—albeit for a praiseworthy object.

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The Iowa court deemed it essential that the jury should be satisfied from the evidence that "*the witness intended from the beginning to act the part of the detective.*" State vs. McKean, *supra*.

And Lord Ellenborough, in Rex vs. Despard, *supra*, laid stress on a like proposition, and said: "I mean persons entering into communication with the conspirators *with the original purpose of discovering* the secret designs of the defendants, and of disclosing them for the benefit of the public."

Does the foregoing statement from the pleadings and evidence make is clear that Sherman "intended, from the beginning, to act the part of the detective?" Does it show that it was his original "purpose" to discover the fraud and crime of Dudoussat, and expose him, *for the benefit of the public*?

Both of these questions must be answered in the negative, if the evidence is to be regarded.

Mr. Bishop says: "An accomplice is one who has become a partaker with others in a crime, whether his guilt is in the same degree with others or not. It must be legal guilt, a participation reprehensible in morals only, or only colorable, is not sufficient." 1 Bishop Crim. Prac., Secs. 1173, 1159; 4 Blackstone's Com. 34, 331; 1 Russell on Crimes, 26. That he further says:

"One who has connected himself with the offence in a way morally corrupt, while yet he is not indictable, is, as a witness, subject, in part, to the same observation as an accomplice, but not fully," his testimony requiring confirmation. *Ibid*.

To my mind, it is a clear conviction that Sherman was, to all intents and purposes, a *guilty* accomplice, and should have been so treated and considered by the trial judge; and that, consequently, the admission of the testimony of Lochte was reversible error.

II.

Pertinent to the foregoing inquiry is one of the special charges which defendant's counsel requested the trial judge to give, and to his refusal to give same a bill of exceptions was retained.

It was that if the jury find from the evidence that Sherman was a guilty accomplice, the corroborative evidence should, at least, have a tendency to connect the accused with the commission of the crime charged.

This instruction was refused by the trial judge for the reason, viz.:

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"In my opinion, Sherman was not an accomplice. * * * I refused to so charge the jury, because the point did not arise in the case, and the charge was not applicable to the facts in evidence."

It is evident that the judge was in error in making this statement from what has been found in the preceding paragraph.

The only way in which his two rulings can be harmonized is to view the question as to whether Sherman was a guilty or a feigned accomplice as having been by the judge entirely withdrawn from the consideration of the jury, and solely resting on the foregoing bill of exceptions. This, in the light of all the authorities, he was not competent to do.

III.

The next bill of exceptions to which my attention is attracted relates to another special charge which was requested by counsel, and refused by the court, viz. :

"It is incumbent on the part of the prosecution to prove to the satisfaction of the jury, beyond a reasonable doubt, that Charles Sherman did feloniously and corruptly give to the accused, Numa Dudoissat, the sum of one hundred dollars, as a bribe, present, or reward, with the felonious and corrupt intent on the part of Charles Sherman," etc.

This request was refused by the trial judge, for reasons already assigned in other bills. This bill is the counterpart of the last two; but it has a different object. That object was, evidently, to obtain from the judge an explanation of what is an apparent conflict between two different paragraphs of his written charge to the jury, one of which is to the effect that "the State must establish beyond a reasonable doubt * * * that the defendant * * * feloniously and corruptly received a certain sum of money * * * from Charles Sherman, as a bribe, present and reward, which was corruptly given to him by said Sherman," and the other was to the effect that "the defendant is chargeable with the crime of *receiving* a bribe, whether the *giver* of the bribe acted himself merely with a view to secure the detection and conviction of the accused, or *otherwise*."

It is evident that these two instructions are inconsistent, irreconcilable, and confusing.

I think the jury should have had the conflict explained; and justice to the defendant required it.

IV.

The next bill relates to the defendant's application for a new trial. The motion assigned fourteen grounds, but the purposes of this dissent only require notice of but one, and that is the eleventh, viz.:

"That the written charges and instructions of this honorable court, to the said jury, were inconsistent, conflicting and contradictory, and calculated to confuse and perplex them," reciting in full the two paragraphs from the written charge, from which the foregoing quotations are made.

But, while the trial judge, in his assignment of the reasons for refusing to grant defendant a new trial, elaborately discussed other grounds of the motion, he omitted altogether this one from any consideration. It is not mentioned at all.

Counsel for the State say in their brief, viz.:

"The objection that the charge contained contradictory statements was not interposed at the trial. No opportunity was afforded, the trial judge to correct a mistake which was unmistakably due to inadvertence," etc.

This statement admits that the two quoted paragraphs from the charge were "contradictory statements," and that same were "unmistakably due" to inadvertence on the part of the trial judge.

But the preceding paragraph of this dissent shows clearly the counsel's error in stating that these "contradictory statements" were not mooted at the trial. They are quoted and referred to in that bill.

The general charge which contained these two conflicting and "contradictory statements," was in writing, and filed in the record on the 3d of December, 1894; and the defendant's requested special charges being also in writing, were handed to the judge, and as the minutes of the court disclose, he kept them under consideration until the following day, when they were severally refused and filed in the record.

This occurred, of course, before the case was given to the jury for their deliberation.

Manifestly, the trial judge had ample time, as well as opportunity, to inform himself in the premises, and he should have, in some proper way, made an explanation of these "contradictory state-

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ments" in his general charge before the jury retired. To his declination a bill was reserved.

After the defendant's conviction, a motion for a new trial was his only alternative relief; and, in our opinion, that relief should have been afforded. Refusing it was relievable error.

I have gone over this case very carefully, and patiently investigated the record, as well as the authorities, as I try to do in every case, and I arise from my study of the matter with the settled conviction that the defendant should have a new trial, because his conviction rests exclusively upon the testimony of Sherman, who is a guilty accomplice, sustained alone by the hearsay statement of Lochte, merely reiterating a statement Sherman had made to him four days previous to the alleged bribery and out of the presence and hearing of the defendant.

For these reasons I feel constrained to dissent from the opinion and decree of the majority.

No. 11,756.

EMILE MULLER VS. P. H. LEGENDRE.

It is alleged by the defendant in reconvention that a sale of shares in the Carrollton Railroad Company was effected for plaintiff's account on the floor of the Cotton Exchange. The plaintiff denies that such a sale was made with his authority. The defendant, upon whom rests the burden of proof, affirms. This being the only evidence upon that point, the alleged sale must be considered as not having been made. The plaintiff and the defendants, as an accommodation to the latter, exchanged checks. The latter plead, that on the day they were to pay and return the amount of the check they made to the plaintiff's order, they applied the amount to the payment of margins called for by the broker to whom they had sold shares, as above stated, for account of plaintiff. The check due by the defendants remained in plaintiff's possession.

In account furnished plaintiff, some time afterward, among the several debits, one is mentioned corresponding with the amount of defendants' check. It is not identified in any respect, further than that there are several similar amounts charged at different times.

The defendants conducted many business transactions for the plaintiff during a number of years.

The total margins called for do not correspond with total loss on sales short.

The charge of an amount for margin is not proof of payment of amount due in a separate and independent matter not at all connected with the usual business between the plaintiff and defendants. Shares in bank and other stock, which the broker fails to show he can control, and which he fails to offer to deliver at the time of the trial, can not be charged to the principal as so much due by him, nor can he be charged with amounts and commissions the brokers testify are due to them for advances made for their purchase.

Muller vs. Legendre.

As it may be that a settlement can be arrived at, just to all parties, and tender made of their shares, the plea in reconvention is dismissed as in case of non-suit.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Louque & Pomes for Plaintiff, Appellee.

A. J. Lewis for Defendant and Intervenor, Appellants.

Argued and submitted, April 18, 1895.

Opinion handed down, May 20, 1895.

Rehearing refused, June 3, 1895.

The opinion of the court was delivered by

BREAUX, J. The plaintiff, alleging that he is the owner of two checks, one for one thousand dollars, the other for five hundred dollars, the last subject to a credit of two hundred dollars, brought suit upon them to enforce payment. He avers that these checks were presented to the bank for payment, and that payment was refused for want of funds to the drawer's credit. That the firm by whom they were drawn, composed of H. Legendre and Pierre H. Legendre, was dissolved at the former's death, in August, 1894. Joseph H. Legendre intervened in the suit and alleged that he and Pierre H. Legendre composed the firm of H. Legendre & Co. since the death of H. Legendre.

The other, P. H. Legendre, denied the averment of plaintiff's petition, and specially alleged in his answer that the firm was dissolved, and that he was the liquidator; that as brokers and confidential agents of the plaintiff, they had managed financial transactions of which they had furnished him statements; that the checks sued upon were parts of these transactions, for which he has received full credit, and which he should have long since returned in compliance with their request.

That in these different transactions the plaintiff remained indebted to them in the sum of nineteen thousand four hundred and seventy-five dollars and forty-four cents, for which they claim judgment. Plaintiff discontinued his suit as to the check of five hundred dollars.

Muller vs. Legendre.

The District Court rendered a judgment in favor of the plaintiff for the sum of one thousand dollars, and dismissed the demand of the defendants as in case of non-suit.

From the judgment the defendants appeal.

Plaintiff and defendants exchanged checks on the 8th day of September, 1892. It was a matter of accommodation between them. The plaintiff promised to wait a few days before presenting the check he held for payment.

The defendants as brokers (among their many transactions for plaintiff) made two sales, the first on March 20, 1892; it was, in broker's parlance, a sale short, seller's option, to Isidore Newman for plaintiff's account, one hundred shares of the stock of the New Orleans & Carrollton Railroad Company, deliverable in six months.

The plaintiff admits the first sale as having been contracted for his account, but he earnestly denies that he authorized the second sale. The defendant, Joseph H. Legendre, insists that he made the sale as broker for his (plaintiff's) account, and that he paid the check in question by depositing a margin. The testimony is conflicting. The defendants earnestly contend that they were authorized to effect the sale, and that having previously deposited margins with the purchaser, in compliance with the contract of sale for plaintiff's account, they paid over to the purchaser an amount of one thousand dollars on the day agreed upon for the payment of the check.

In making the purchase the name of plaintiff was not mentioned.

We quote from the testimony of the plaintiff:

Q. Be kind enough to state precisely what took place between you and Mr. Legendre, in regard to the matter—the first knowledge you had about it—how did he come to do it?

A. By his sending me a notice at the time in 1892.

The witness states, in addition, that he informed the defendant, Joseph H. Legendre, that this sale was unauthorized, and did not bind him. The testimony of this defendant is not corroborated. Aside from the conflicting testimony of the plaintiff and this defendant, there is no testimony regarding the alleged sale on the floor of the exchange. All that this defendant affirms about this sale is denied by the plaintiff.

We can not, upon such conflicting testimony, conclude that there was a sale. There were two contracts. It was to secure the last, however (the defendants testify), that the deposit of one thousand

Muller vs. Legendre.

dollars was made. The evidence is that it was deposited to secure the last sale, which sale we have just determined is not supported by proof.

We think that it is equally as conclusive that the margins alleged to have been deposited with Isidore Newman, the purchaser, were not deposited to secure the first contract of sale, for the reason that it would have been out of all proportion to the fall in value of the stock, when account is taken of prior deposit, made to secure plaintiff's interest in the first contract.

The amount of loss on the first of these sales was: New Orleans & Carrollton Railroad contract, one thousand one hundred and seventy-three dollars and seventy-six cents. The deposits, it is asserted, called (by the purchaser of these shares) from the defendants, was four thousand two hundred dollars; balance, three thousand and twenty-six dollars and twenty-four cents larger than losses.

There was, therefore, no necessity to add the last one thousand dollars to that margin, if these margins were called to secure both sales, as we have reason to believe they were, although it was not proved that they were for the account of the plaintiff.

The loss on the second sale (the sale plaintiff testifies was not authorized)	
was	\$2,986 70
First sale	1,178 76
Total loss on both sales	\$4,110 46
Margin	\$4,200 00
Still leaving in excess of margin over loss	\$89 54

We are not informed that there was a remittance of eighty-nine dollars and fifty cents made by the purchaser, Isidore Newman, of amount of surplus of remittance over loss.

In any point of view, keeping account of the first sale, the whole of the last payment of one thousand dollars was not applied to the margin or loss on the last sale.

We are not impressed by the importance the defendants' seek to give to an account identified in evidence by the letter "A." The entry of the account to which our attention is directed, reads: "September 17, by margins deposited, one thousand dollars." And it is invoked as notice to the plaintiff, that one thousand dollars was applied to the margin in the last contract and in satisfaction of plaintiff's check. It is a brief reference to a margin, without any mention whatever of a check or sale.

The defendants say that as plaintiff's brokers and agents they bought stocks, bonds and other values for him; they accepted delivery, borrowed money on them, divided the stocks and pledged it as occasion demanded to carry on his speculation; that he never saw one-tenth of these securities, amounting to as much as two hundred thousand dollars a year. In view of these extensive dealings, the entry was not notice of the payment of a check.

We have noted, *supra*, that the liquidator, representing the defendant partnership and one of the partners as intervenor, claims the sum of nineteen thousand four hundred and seventy-five dollars and forty-four cents in reconvention.

The largest item of this alleged indebtedness consists of a purchase by the defendant for account of plaintiff of one hundred and forty shares of the People's Bank stock, about December, 1891. In purchasing, the defendant's put up nearly five thousand dollars in addition to plaintiff's margin.

These shares were pledged by the defendants upon their own notes and in their name.

We are informed by the record that brokers carry contracts in this manner; in their own names for account of their clients.

Subsequently the pledgee of the defendants, Glandot, transferred the stock to his own name for his security and to collect the dividends on the shares and apply to the payment of defendants' note, secured as to its payment by this pledge.

This transfer of the lender, also, it seems, has the sanction of custom.

We infer from the testimony that in these dealings among speculators and brokers, although the transactions are conducted in the name of the brokers, and although frequently the lender, as here, transfers the property pledged to his own name, yet it is understood that at a stated time the broker will control the investment.

The loan to the defendants was secured by other shares, as well as by the People's Bank stock.

It is not manifest that the firm now dissolved can deliver these shares. In any event, it is not in proof that the defendants ever called on plaintiff to take up this stock, or that a tender was ever made.

At least the former was a condition precedent to a suit, and we think that under the circumstances even the tender was a requisite.

State ex rel. Liggins vs. Judge.

We have thus far treated this item as separate and independent of the others. But there are a number of items; some are admitted correct by the plaintiff, and others are admitted by the defendants; it follows that a tender of shares covered by one item (Peoples Bank stock, for instance), will not suffice, but that a settlement should be made of all the transactions, based upon the respective rights of the plaintiff and of the defendants.

The judgment of the lower court left these questions open for future settlement. We think it does justice between the parties.

It is affirmed, at appellants' costs.

No. 11,810.

STATE EX REL. J. SAMUEL LIGGINS VS. THE JUDGE OF THE THIRD
JUDICIAL DISTRICT.

No badge of nullity being exhibited on the proceedings the restraining order must be dissolved, and relief by *certiorari* denied.

APPPLICATION for a Writ of *Certiorari*.

Kidd & Van Hook for Relator.

E. M. Graham for Respondents.

Opinion handed down, May 6, 1895.

Rehearing refused, June 3, 1895.

The opinion of the court was delivered by

WATKINS, J. Relator's complaint is that he was sued as defendant in the cause entitled Hamilton & Brooks vs. J. S. Liggins, on the docket of the respondent's court, for damages alleged to have been suffered by plaintiff by reason of his having made them lose a debt due them by one Arthur Kelly.

He avers that the petitioner's allegation was that Kelly had traded with them during 1892 to the amount of ninety-two dollars and seventeen cents, and delivered to them two bales of cotton on account,

47	1022
47	1519
47	1029
48	253
48	760
48	1253

State ex rel. Liggins vs. Judge.

and that the evidence on the trial showed that the cotton was worth sixty-eight dollars and ninety-five cents, leaving the balance of twenty-three dollars and twenty-two cents as the actual measure of damages due. But he further avers that in order to give the court jurisdiction, the plaintiffs averred that he, as defendant, had caused them damage to the extent of one hundred and four dollars in the manner stated above; and that on the trial he objected to the introduction of any testimony, on the ground that the court had no jurisdiction, but the objection was overruled and the testimony admitted.

That on the trial judgment was rendered against him for the sum of seventy-seven dollars, from which he prosecuted an appeal to the Court of Appeals; and his appeal was dismissed.

That for these reasons he is compelled to apply to this court for relief from a judgment that is illegal, because of it having been rendered by a court without jurisdiction *ratione materiæ*.

The respondent returns that, in compliance with the order of this court, he has annexed thereto a certified transcript of the cause relator refers to as depending in his court, and he affirms that his said court had full and complete jurisdiction thereof, because the allegation of the plaintiffs' petition is that they had sold Kelly goods "to the amount of ninety-nine dollars and seventeen cents and more," on which indebtedness the price of two bales of cotton had been paid and credited. He avers that thereupon the plaintiffs lay the amount of their damages at the sum of one hundred and four dollars and nineteen cents, and the further sum of twenty-five dollars as attorney's fees, and for these two amounts they prayed for judgment against the relator as defendant. He further avers that the relator appeared and filed an answer, unaccompanied by any plea, to the jurisdiction of the court; but when the plaintiffs offered evidence on the trial, he interposed an objection to that effect, "on the ground that he was not domiciled in the parish when the suit was brought."

He further avers that the evidence adduced on the trial disclosed that, notwithstanding Kelly had paid to the plaintiffs the proceeds of two bales of cotton on his account, he still owed them ninety-nine dollars and seventeen cents at the time he absconded, and this sum, with the interest added, made the sum of one hundred and four dollars and twelve cents, for which the plaintiffs sued and demanded judgment, and attorney's fees in addition.

State ex rel. Liggins vs. Judge.

Looking into the petition of Hamilton & Brooks against the relator, we find the allegations thereof conform to the statement of the respondent's return exactly as to the amount demanded, being "ninety-nine dollars and seventeen cents and more," for which the suit was intended to make him responsible, and for which the plaintiffs demanded judgment.

That record shows that, in the first instance, judgment was rendered in favor of the relator, as the defendant, but on the plaintiffs' application a new trial was granted; and, upon a second trial, judgment was rendered in favor of the plaintiffs, in the sum of seventy-seven dollars and twenty seven cents, from which decree the relator, as defendant, unsuccessfully prosecuted an appeal to the Circuit Court.

From the record and the respondent's return, it substantially appears that the plaintiffs' allegation, to the effect that Kelly had dealt with them "to the amount of ninety-nine dollars and seventeen cents and more," was by the relator, as defendant, as well as his counsel, taken to be the full amount of Kelly's original account, which the credit of the proceeds of the two bales of cotton reduced to a sum less than fifty dollars, the lower limit of the original jurisdiction of the District Court. Const., Art. 109.

But such was not the case, as, in point of fact, the total amount of Kelly's account with Hamilton & Brooks was one hundred and sixty-eight dollars and twelve cents, and when the sum of sixty-eight dollars and ninety-five cents, the proceeds of two bales of cotton, were applied thereto as a credit, the net balance of ninety-nine dollars and seventeen cents was produced.

It was proper for the District Judge to hear and consider evidence on the question, and to base his judgment thereon, as evidently he did.

For, on the face of the petition, Hamilton & Brooks demanded of the relator, as defendant, a judgment for a sum in excess of one hundred dollars, and relator's reliance was evidently upon proof to exhibit an inflation of plaintiffs' demands, for the purpose of maintaining the original jurisdiction of the District Court *ratione materiæ*.

His effort in this respect was unavailing in the District Court, and, possibly, he lost his appeal in the Circuit Court on account of the evidence not having been reduced to writing and incorporated in the record for the examination of the judges of the Court of Appeals.

State vs. Duncan et als.

Whilst not sanctioning resort to *certiorari* as affording proper relief, we are clearly of opinion that the proceedings of the respondent have been perfectly regular, and that no badge of nullity appears in them; hence we are bound to dissolve the restraining order and give judgment against the relator.

It is therefore ordered and decreed that the preliminary restraining order be dissolved, and that the relator be taxed with the cost.

No. 11,804.

47 1025
48 904

STATE OF LOUISIANA VS. MARCUS DUNCAN ET ALS.

A conviction resting exclusively upon the testimony of two accomplices, by a jury in part composed of persons who participated with a voluntary *posse* in chasing after and running down the defendant, and which jury was drawn from a *venue* selected by only three of six jury commissioners, one of whom had, before and after the trial, taken a most active and conspicuous part in securing the defendant's arrest and conviction, can not be sustained as the result of the fair trial "by an impartial jury" which is guaranteed by the Constitution to one who is accused of crime.

A PPEAL from the Sixteenth Judicial District Court for the Parish of Washington. *Reed, J.*

M. J. Cunningham, Attorney General, and *Bolivar Edwards*, District Attorney, for the State.

George E. Williams for Robert Duncan, Jr., Defendant, Appellant.

Argued and submitted, April 27, 1895.

Opinion handed down, May 6, 1895.

Rehearing refused, June 3, 1895.

The opinion of the court was delivered by

WATKINS, J. The defendant, Robert Duncan, Jr., appeals from a verdict of guilty which was rendered against him on the charges of burglary and larceny, and a sentence to eight years' imprisonment at hard labor on the first charge, and two years on the second charge.

The indictment preferred said charges, in two counts, against the several defendants, Marcus Duncan, Robert Duncan, Jr., Lucius

State vs. Duncan et als.

Payne and Walter Payne. On account of serious illness, Marcus Duncan could not be brought to trial. Lucius Payne and Walter Payne confessed, and "turned State's witnesses," the State producing no other witnesses on the trial, and the conviction of Robert Duncan, Jr., resulted.

Whilst there are several bills of exceptions to which attention has been attracted, there is but one which, in our view, requires discussion, and that relates to declination of the trial judge in granting a new trial.

Amongst others, the following grounds are assigned for a new trial, viz.:

1. That of the six jury commissioners, only three participated in drawing the venire, and one of them was violently prejudiced against this defendant, and his prejudice resulted greatly to his injury and to the violation of his legal rights.

2. That two of the petit jurors who formed a part of the panel who tried and convicted this defendant, constituted a part of the voluntary *posse* who searched for, and assisted in procuring the arrest of some of the accused defendants.

The motion and accompanying affidavit declare that the prejudice of the jury commissioners was only developed and took shape after the jury were empaneled, and the participation of the two jurors named in the proceedings of the *posse* only became known to the defendant after the trial and his conviction.

They further declare, that, prior to the trial, the two jurors named were put upon their *voir dire* and interrogated with regard to their qualifications; and that, in the course of their interrogation, they affirmed that they had no feeling for or against the defendant, and had neither formed nor expressed an opinion relative to his guilt or innocence.

On the trial of the motion the following facts, substantially, were developed, viz.:

That no summonses were issued by the clerk of court for the procurement of the attendance of the jury commissioners, but that officer made only a *verbal request* of the sheriff to let them know that their services were wanted. He did not even make that request of the sheriff *personally*, but sent a message to that effect by a son of one of the jury commissioners.

That this message was received by the sheriff; but he—to use his

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own language—"failed to get a summons to either Mr. Brown or Mr. Burch."

That, although denying any prejudice against this defendant, the jury commissioner, Vernado, admitted that he did take steps to render the District Attorney assistance in his prosecution, and made an effort, in connection with others, to employ an attorney to assist in his prosecution, but that these negotiations failed, because the lawyer whom they sought to employ demanded a fee larger than they felt willing to pay.

He admitted that he had "assisted in procuring testimony for the State," against this defendant; that he had, at different times, participated in public meetings that were held for the purpose of devising ways and means of employing counsel to aid the District Attorney in the prosecution of the indicted defendants, and that he had consulted with his neighbors for that purpose.

This jury commissioner, as a witness on the trial of the motion, said:

"The object of the meeting was to devise means to hold the testimony here against the *Duncans*. I am not prejudiced against the *Duncans*. They have never injured me. I am prejudiced against crime."

Then the following occurred, viz.:

Q. Did you or any of your party send for Judge Reed?

A. Well; as I understood the Payne boys had plead guilty, and there was a move on foot by Duncan's friends to defer the trial of Duncan until the Payne boys would be sentenced, and deprive us of their evidence, and that was what we sent for Judge Reed for, to ask him to hold the Paynes until the Duncan trial could be gotten up. The District Attorney asked me about one of the jurors, who was related to the accused (defendants), and I recommended him as being an honest man; and I also told him of one or two that, in my opinion, would not be good for him to take," etc.

The testimony further developed the fact that one of the jurors, who is named in the motion, was not in the particular *posse* who assisted this defendant. This juror, as a witness, said:

"I was in a *posse* that arrested Thomas Magee. I do not know whether he was an accomplice or not. The grand jury found no bill against him. I was not in the chase after Robert and Marcus Duncan and the Paynes. I am told that they were captured by a part of

State vs Duncan et als.

the *posse* I started with. I was not here when they came back. When I started out I did not know who we were after. We were after the robbers.”

A similar statement is made by the other juror who is mentioned in the motion.

These jurors admitted that they were sworn upon their *voir dire*, and testified that they had no bias nor prejudice against this defendant, and that they had neither formed nor expressed any opinion relative to his guilt or innocence.

On this state of facts we are called upon by the State to affirm that the accused has had a fair and impartial trial, but we feel bound to decide that proposition in the negative. A jury thus composed can not be such a fair and impartial one as the law contemplates, and we can not altogether rid our minds of the impression that one of the jury commissioners was not sufficiently disinterested to exonerate him from the imputation of fault in the premises.

To say that a conviction, resting solely upon the testimony of two accomplices, by a jury in part composed of persons who participated with a voluntary *posse* in chasing after and running down the defendants, and which was drawn from a *venire* selected by three jury commissioners, one of whom had, before and after the trial, taken a most active and conspicuous part in procuring this defendant's arrest and prosecution, is legal, passes comprehension as well as credence.

There can be no doubt of the fact that all of these circumstances conspired together to do this defendant great and serious injury. These things were unknown to the defendant at the time of the trial, and could not, in the nature of things, have been anticipated by him in sufficient time to have guarded himself against the resulting injury. The answer of the jurors, when interrogated on their *voir dire*, threw his counsel off his guard. The discovery was not made until after the trial.

In quite a recent case we had occasion to speak of similar proceedings in a criminal case in which “one of the jurors empanelled on the trial was one of the *posse* that searched for the accused” (State vs. Defee, 47 An. 198), in which we said, viz.:

“A trial of a prisoner by the sheriff and the *posse* arresting him would certainly strike the mind, to say the least, as not consistent with the impartial jury guaranteed the accused in criminal prosecu-

State vs. Payssan.

tions. The empanelling of one of the posse on the petit jury, was, to that extent, an abridgement of the prisoner's right to a fair trial. True, we have the rather scant expression of the juror on his *voir dire* (that) he thought he could try the case on the law and the evidence. (But) we think his relation to the subject disqualified him from making the attempt," etc. * * * "Those who take an active part in bringing the prisoner to justice should not have imposed upon them the other function of trying the accused in whose apprehension they have exhibited a zeal inevitably calculated to incapacitate them from giving him a fair trial." For a stronger reason is that true in this case. The verdict and sentence must be reversed and a new trial granted.

It is, therefore, ordered and decreed that the verdict and sentence be set aside, a new trial granted, and the case remanded for further proceedings according to law.

No. 11,710.

THE STATE VS. J. PAYSSAN.

The preservation of health and the maintenance of cleanliness are not foreign to the ends of a municipal corporation. Where the Legislature confers express powers upon the municipality to pass ordinances to protect health and maintain cleanliness, an ordinance adopted in order to remove and destroy animal and vegetable matter is not necessarily a nullity and unreasonable. The purpose of the ordinance is within the scope of the express legislative power.

The ordinance being in harmony with the general laws of the State, it is not *per se*, oppressive.

One has, in so far as relates to health and cleanliness, in which the public is concerned, the right only to a reasonable use of his property. He is expected to endure a reasonable amount of discomfort and annoyance for the public good without compensation. It is not a divestiture of vested rights, so long as the limitations upon private rights and personal liberty is not unjustifiable and unreasonable.

The corporation may contract with the highest bidder in order to remove and destroy, under certain regulations, the offals that are annoying to health. The record does not disclose that the contract was entered into in violation of law. Under the state of facts here, the defendant, not being the occupant of the premises, had no interest to complain of the mode adopted for collecting and removing the garbage.

In a civil suit, the amount involved being less than the *minimum* limit of the court's jurisdiction, only questions of legality and unconstitutionality of the ordinance can be brought up for review on appeal.

Upon the issues presented of which this court has jurisdiction on appeal, the ordinance is not illegal. Whatever questions regarding the mode of enforcement (such as that the ordinance does not apply to the state of facts) can, be brought up, if at all, by *certiorari* under the supervisory jurisdiction of this court.

47	1029
47	1034
47	1029
49	828
47	1029
417	571

State vs. Payssan.

APPPEAL from the Second Recorder's Court for the Parish of Orleans. *Aucoin, J.*

Branch K. Miller, for Plaintiff, Appellee.

P. L. Fourchy and Charles F. Claiborne, for Defendant, Appellant.

Argued and submitted, April 27, 1895.

Opinion handed down, May 6, 1895.

Rehearing refused, June 3, 1895.

The opinion of the court was delivered by

BREAUX, J. The defendant, fined for violating the ordinance relative to garbage, urges here that the ordinance is unreasonable and oppressive, and that it was not adopted with the view of preserving health and to maintain cleanliness.

The defendant says: That during about ten years he furnished milk to a boarding-house, at which house the proprietor collected for him the waste bread, meat and soup in a can, which he carried away in the evening, and left another in its stead; that he, at times, gave small quantities of milk; that these substances are clean and healthy, and are used by him as food for his dogs, and that they are not garbage.

Plaintiff introduced proof that they were not as represented by the defendant—mere scraps and refuse of the table—but garbage.

The defendant interposes a number of grounds of defence to be considered, we understand, if the facts are as contended by the plaintiff—that is, if the preponderance of evidence is that the substances are garbage.

With reference to the unreasonableness of the ordinance and the oppression charged, we deem it in place, preliminarily, to state that the Legislature delegated the authority to the municipality to adopt needful regulations for the protection of health and to maintain cleanliness.

It is true that the word "garbage" is not used in the charter, but the equivalent is therein expressed. The council is authorized to adopt ordinances for the frequent inspection of buildings and prem-

ises and to compel cleanliness. This necessarily includes the authority to have garbage moved away and destroyed that is annoying to health. The general power regarding health and cleanliness having been given, we are of the opinion that the ordinance can not be impeached as invalid on the ground of unreasonableness.

There are a number of well considered decisions upon that point, and text writers upon the subject of municipal corporations have approvingly referred to them. *District of Columbia vs. Waggaman*, 11 American and English Corporation Cases, 417; *City of Peoria, vs. Calhoun*, 29 Ill. 817, 820; *Coal Float vs. City of Jeffersonville*, 112 Ind. Rep.; *City of St. Paul vs. Colter*, 12 Minn. 49; 68 Cal.; *Dillon on Municipal Corporation*.

If we were to concede that the authority was not as we have just stated, express, we would nevertheless not be hasty to conclude that the ordinance in a matter as important as health and cleanliness is not within the inherent powers of the corporation.

For it does seem to us, without reference to express power in the charter, that a municipal corporation does not legislate unreasonably by adopting ordinances to protect the community against the offensive and unwholesome smell of decaying vegetable and animal substances, and that such ordinances are consonant with the purpose of such corporation and consistent with the laws.

In an early case this court pertinently said, in *pari materix*: "The police of cities require many regulations which grow out of their situation, climate and their population. A much stronger reason than that now before us must be presented to induce the court to interfere." *Milne vs. Davidson*, 5 Martin N. S. 410.

The ordinance is general in its character and in harmony with the laws of the State, and, therefore, can not of itself be oppressive.

We are not here concerned with its enforcement, as that is not before us. As to the ordinance, we repeat, it is not oppressive.

As to the grounds of the defendant that the ordinance creates a monopoly, that it divests vested rights, we think it sufficient answer to say:

On this appeal we can only decide that garbage which may cause discomfort, and which is injurious to health, can be removed and destroyed under an ordinance adopted under a legislative grant of power, and that this ordinance may be adopted without creating a monopoly, or divesting one of vested rights.

State vs. Payssan.

The scope of the defence must be restricted to the questions that the defendant is in a position to raise and have decided.

He is without right to raise objections to the section of the ordinance which prohibits the occupants of premises from mixing ashes or other substance with garbage, and the section following, requiring the occupants to collect the garbage and have it ready for removal. In other words, not being the keeper of the boarding house, none of those acts devolved upon him. He was concerned only with getting the contents of his can to feed his dogs.

We do not desire to belittle his cause by recalling the use he made of the contents of his can.

It is his right to feed them with such substances as he stated in his testimony. His testimony is contradicted by plaintiff's witnesses.

Without undertaking the useless task here of determining who is right, as a matter of fact, about these substances, we will state that if the weight and preponderance of the evidence is with the plaintiff (and if it is as the plaintiff urges), it was not fit food for dogs, unless the dogs of the defendant are like those that a recent explorer saw in Africa. They were the descendants, he said, of the dogs that devoured the body of Jezebel, wife of Ahab, and they were prowling in the space in modern eastern language called the "Mounds," near the modern village which occupies the site of Jezreel; they were wandering without the walls of the village for offal and carrion thrown to them to consume.

The questions resolved themselves in the following:

If they were garbage, the ordinance upon the issues presented is not illegal and unconstitutional.

If they were sound scraps and refuse the facts were not brought up before the court in the manner required.

Questions within the supervisory jurisdiction of this court can not be considered under our appellate jurisdiction.

We can only pass on appeal upon questions of legality or constitutionality of the law.

If the recorder has decided that substances were garbage that are not garbage, that is a question of fact which does not affect the constitutionality or legality of the ordinance.

The amount involved being less than the minimum jurisdiction of the court, whatever remedy there is here is under the writ of *certiorari*.

Broussard vs. West et als.

The defendant complains of a failure to properly advertise the ordinance, another objection founded on law.

The ordinance contains provisions to award the contract to the highest bidder.

The contract and the proceedings prior to the award, are not attacked. We are not informed that there was failure to follow the terms of the ordinance in making the award to the highest bidder.

We do not perceive that there is reason to complain of an ordinance authorizing the removal of garbage by contract.

The city government has the power of deciding in what manner a nuisance shall be removed. In having the work done by a contractor, employed in the manner required by law, they have not exceeded the discretion with which they are vested in such matters.

Such contracts are frequent, and when fairly entered into, give no rise to legal objection. The issues here do not justify an inference that a privilege has been granted, unauthorized and reprobated by law.

The judgment of the Recorder's Court is affirmed, at appellant's costs.

No. 11,799.

JERISAN BROUSSARD VS. ABEL WEST ET ALS.

The title of a purchaser in good faith from the vendee in a sale with a power of redemption, after the sale has become absolute by reason of the non exercise of the right of redemption, is secure against an attack from the original vendor or his creditors, on the ground that the "sale with redemption" was really a contract for security which did not shift the ownership. The purchaser is not affected by secret equities, unknown to him, or not disclosed by the record. Though the knowledge which the purchaser of a piece of property has of the pendency at the time of his purchase of a revocatory action against his vendor to have his title set aside for fraud may affect him should that action terminate in favor of the plaintiff, but it does not, if it terminate in favor of defendant, charge him with general notice that the title is subject to attack on other grounds.

A PPEAL from the Twelfth Judicial District Court for the Parish of Calcasieu. *Schwing, J., ad hoc.*

Edward L. Wells, for Plaintiff, Appellant:

A creditor may bring petitory action to recover his debtor's prop-

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erty alienated to his prejudice, and for which the debtor fails or refuses to sue. 30 An. 733; 33 An. 898.

The prescription to this action is ten years and not one year. *Idem.*

No one can convey a better title than he himself has. 4 R. 118; 2 An. 143; 4 An. 52, 104; 5 An. 10, 66; Hennen's Digest, 1835, No. 9.

Redeemable sales unaccompanied by delivery of which the consideration is inadequate, will be treated by the court, in the absence of proof to the contrary, as contracts by which the property nominally sold stands as security. 5 An. 99; 16 An. 11; 15 An. 386; 23 An. 665, 658; 38 An. 891, 154; 40 An. 307, 323; 2 An. 480; 42 An. 395; 44 An. 925; 32 An. 94.

Such a sale does not have the effect of transferring the title or ownership. *Idem.*

Third persons may contradict a writing by parol. Hennen, 532, Nos. 1, 2, 3, 4, 5, 6, 7, *et seq.*

Arsene P. Pujo for Defendants, West and David Bloch, Appellees:

ESTOPPEL.

The surviving widow and heirs joining in an attack upon the validity of a sale made by the husband and father, are estopped by the judicial admissions made in a former suit (wherein the verity of the same sale was at issue), that said sale was *bona fide* and for the consideration therein stated. *Maples vs. Nutty*, 12 An. 759. They have no standing in court unless they show affirmatively by allegation and proof that there would be something coming to them after the payment of the debts of the succession. 15 An. 140, *McQueen vs. Sandel*.

Plaintiff, claiming to have resorted to a suit in *loco debitor*, is restricted to the proof which would have been exacted from his debtor. It can have no greater rights. 33 An. 898.

Plaintiff having failed to allege error, fraud or simulation will not be permitted to show title to real estate by parol. C. C. 2255; 35 An. 1052, 505.

PRESCRIPTION.

The character of an action must be determined from the nature of the relief prayed for. In a suit attacking the validity of a sale

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a prayer for its avoidance, annulment and rescission characterizes it as a revocatory action. Plaintiff's action was forfeited by delay, having failed to bring his suit for revocation within the time required by law. 31 An. 592; 41 An. 102.

MERITS.

A debtor may validly sell with right of redemption, within a limited time to secure a creditor. The sale becomes absolute after the lapse of time agreed. 32 An. 96, 784.

Failure to redeem within specified time *ipso facto* vests absolute title in vendee. 35 An. 855; 38 An. 271; 36 An. 404.

Before courts are authorized to set aside a *vente a reméré* it must appear: (1) That the price was vile and totally inadequate. (2) That the parties intended the act as a mortgage or security for debt. (3) That delivery was never made to and possession never vested in the vendee. 40 An. 307; 44 An. 925.

An act passed in Louisiana which appears upon its face to be a *vente a reméré* can not be shown as regards third persons to be a mortgage. 34 An. 797.

Positive testimony of witnesses whose character and credibility has not been impeached can not be disregarded for mere suspicions. Especially is this true when the witnesses reside in the vicinity of the judge who is peculiarly competent and qualified to properly appreciate the value of their statements. 43 An. 61, 855.

McDonald & Overton, for the Defendant, Solomon Bloch, Appellee:

Redeemable sales, unaccompanied by delivery, of which due consideration is inadequate, will be treated by the court, in the absence of proof to the contrary, as contracts by which the property nominally sold stands as security. 5 An. 99; 16 An. 11; 15 An. 386; 23 An. 665-668; 38 An. 891, 154; 40 An. 307, 324; 2 An. 480; 42 An. 395; 44 An. 925; 32 An. 94.

A petitory action corresponds to ejectment. Am. and Eng. Ency., Vol. 6, p. 226, note 1; *Gilmer vs. Poindexter*, U. S. How. 360.

Inasmuch as the claim seems to be founded on the right of possession, the party seeking a recovery must show himself entitled to such right generally, at the time of the commencement of the

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suit and of the trial, or at the time of demise laid in the declaration.

"The question at issue is the legal right to the possession, as between the parties, and not the question of abstract title." Am. and Eng. Ency. of Law, Vol. 6, p. 228.

"The fictitious proceedings in the action of ejectment are based upon the principle that, as against the one entitled to possession, the actual occupier or tenant in possession of the premises is wrong-doer, and this must exist as a fact at the time of the commencement of the action, or no recovery can be had." Am. and Eng. Ency., Vol. 6, p. 229.

"In some cases the defendant in a petitory action is permitted to assail plaintiff's title as a consequence of the rule that the latter must recover on the strength of his title." Cross on Pleadings, under act of nullity, Chap. 15, p. 227, Sec. 279.

If the defendant, independent of the contest of plaintiff's title, presents a title of his own, and sets it up as his muniment of title, and relies thereon, then, in that event, only can the plaintiff attack defendant's title. 38 An. 438.

"Plaintiff in petitory action must be absolute owner of property." Caze vs. Robertson, 14 An. 220.

The *Actio Pauliana* of the Roman law, which is our revocatory action, is to set aside contracts which have a real existence, but which the law will not permit to impede the creditor in recovering his debt. 29 An. 6 (bottom of page).

Argued and submitted, May 11,, 1895.

Opinion handed down, May 20 1895.

Rehearing refused, June 3, 1895.

Plaintiff alleges that he holds a judgment against one John Miller for five hundred and forty-four dollars, with legal interest from 24th March, 1884. That he is unable to execute the same, because his debtor during his lifetime, on August 25, 1885, by an ostensible contract of sale, with the right of redemption in twelve months, ostensibly sold and conveyed to David and Solomon Bloch all of his property, consisting of one hundred and sixty acres of land in Calcasieu parish, with the buildings and improvements thereon, and the

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said David and Solomon Bloch on October 13, 1886, ostensibly sold the same to one Abel West, such title as they acquired. That West bought said property while a suit was pending before the District Court for Calcasieu for the revocation of the title to said Blochs, and before the decision of said revocatory action, which had been brought by creditors of Miller against the Blochs and Miller. That on the trial of said suit it was shown that Miller never intended to sell, nor the Blochs to buy said property. That while it was recited in the act of sale that eight hundred dollars had been paid in cash as the consideration of said sale, in truth the consideration was the giving by the said Blochs to Miller of their promissory note, of even date with said sale, payable twelve months after said date, without interest, which said note was by Miller discounted, and with the proceeds he paid to the Blochs the sum of three hundred and forty-three dollars in settlement of an account they had against him. That the pretended act of sale was intended by both parties to secure the Blochs from any loss on account of said note, and for the purpose of collecting the amount due them upon said account. That the pretended price of said ostensible sale was grossly inadequate to the real value of said property at the time of the passing of said sale; the total amount realized by Miller from said pretended sale was less than six hundred dollars, and the property was worth at least at that time, and still, twenty-five hundred dollars.

That said pretended sale was an innominate contract which gave to the Blochs the right of enforcing the same in a proper proceeding but did not divest the title of Miller in their favor. That having acquired no title by said contract, they could not transfer one to another person. That the title of West being derived from those who had no title is inoperative and void. That Miller died several years ago, leaving a widow and six children, whom petitioner names, who all reside in Texas, except George Miller, who is a resident of Calcasieu. That Miller left no other property at his death than the property pretended to have been sold. That plaintiff, as a creditor, of Miller and of his succession, is entitled to a petitory action to bring back said property into the mass of Miller's assets, to the end that it may be subjected to his mortgage debt; to that end that said pretended act of sale should be declared by the court to be a contract for security, and nothing else, and that the title by the Blochs to West, is null, void and of no effect as a title.

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Abel West, one of the defendants, pleaded the prescription of one year in bar of plaintiff's demand; that he purchased the property in good faith and with full warranty of title from David and Solomon Bloch for the price and sum of fifteen hundred cash. That immediately after his purchase, he moved upon it, and has resided there ever since. He especially denied that the sale from the Blochs to him was simulated or fraudulent, but affirmed its integrity in every respect; that he had paid all taxes due on the property as the same became exigible from and including the year 1887, up to and including the year 1894; that, in addition to this, he had built fences around the land, and had improved and bettered the property, at a cost to him of not less than one hundred and fifty dollars; that he has completed and painted the house, at a cost of at least six hundred dollars; that he has planted orange as well as other fruit trees, which are now bearing, for all of which he is entitled to recover as a purchaser in good faith; that, at the time he purchased the property it was not worth more than eight hundred dollars, but desiring to reside near his daughter, he was induced to pay more than its real value to gratify his whim, and he specially denied that at the time of his purchase it was worth twenty-five hundred dollars. That at the time he purchased the property, there were no liens nor mortgages affecting the same in favor of plaintiff, nor any suit by him questioning the ownership of the property, nor the legality of the sale from bidder to his authors.

David and Solomon Bloch, defendants' vendors, were called in warranty. Both pleaded the prescription of one year in bar of plaintiff's demand, and both, under reservation of this exception, answered, denying the allegations of plaintiff's petition, and asserting and maintaining the reality of the sale and validity from Miller to themselves, and their own sale to West, and averring that all parties were in good faith. Solomon Bloch asked and was permitted to call David Bloch in warranty, upon the ground that in the settlement of affairs between himself and David, the latter had released him from all obligations of the kind described in their act of settlement, which he contended would cover the claims of West set up in this case. He asked judgment against David Bloch in the event of plaintiff's obtaining judgment, setting the two sales aside.

David Bloch, in answer to this call, denied that Solomon Bloch had been released from liability under West's call in warranty, and

prayed that he be adjudged to pay one-half of whatever amount West might be held entitled to recover.

The widow and heirs of John Miller answered through counsel under reservation of the benefit of inventory, and disclaiming any liability for the debts of the husband and father, and joining plaintiff in his attack upon the title.

Defendant subsequently pleaded, in bar of plaintiff's right to recover, that he is estopped from asserting any other right than could have been urged by his debtor, Miller, and that the heirs and widow of Miller are also estopped by reason of the judicial admission made by him in his answer filed in the case of *Turner & Oates vs. John A. Miller et al.*

The District Court rendered judgment, rejecting plaintiff's demand, and he appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. The evidence shows that on the 25th day of August, 1885, John A. Miller sold the property in litigation herein to David and Solomon Bloch for eight hundred dollars, with a power of redemption in the vendor within twelve months. The act was duly recorded. Miller remained in possession during the year allowed him to redeem, paying rent as a tenant. At the end of that time he vacated the premises, and David and Solomon Bloch, on the 13th day of October, 1886, sold the property for one thousand five hundred dollars cash to Abel West. This sale was also duly recorded. In the interval between the purchase by the Blochs and their sale to West, a revocatory action was instituted by Turner & Gates against Miller and the two Blochs to have the sale set aside as fraudulent, but the plaintiffs were defeated in the action, and the sale maintained. They seem to have renewed their attack through an hypothecary action directed against West, grounded upon the fact that before he bought they had recorded a judgment which they had obtained against Miller, and upon a contention that the contract between him and the Blochs was not one of sale or transfer of ownership, but simply one of suretyship, which, leaving the title still in Miller, the property became affected by their judicial mortgage in the nominal ownership of the Blochs.

The proceedings in that case are not before us, but are referred to

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by plaintiff's counsel, and it would appear that Turner & Oates were again unsuccessful in their suit.

The present action was brought by Broussard, in January, 1895. A very large portion of the transcript is taken up with testimony as to the value of this property at the time of the contract between Miller and David and Solomon Bloch. It is obvious, from reading the prayer of plaintiff's petition, that he is not seeking to have the contract between those parties set aside as a sale on account of lesion, or on account of fraud, but to have the act of the 25th of August, 1885, purporting to be an act of sale with power of redemption, declared to be, in fact, an act of mortgage. The prayer is "that the pretended contract of sale be declared to be a *quasi* mortgage or a pignorative contract not divesting the title of Miller or his estate, and that said sale by David and Solomon Bloch be declared inoperative, null and void, the property restored to the possession and ownership of the estate of Miller."

The prayer as against West is based upon the theory that when he bought from the Blochs, the property to his knowledge did not belong to them, but to Miller.

So far from conceding that the contract evidences a sale, and directing his attack against it as such, the whole theory of plaintiff's case is that it is not a sale, but that Miller's title has never been divested at all, and that the property has been all the time the pledge of his creditors. The testimony we have referred to, was an attempt, we presume, by plaintiff to bring his case within the line of decisions cited by him, which have declared that redeemable sales, unaccompanied by delivery, of which the consideration is inadequate, will be treated by the courts, in the absence of proof to the contrary, as contracts by which the property nominally sold stands as a security." *Baker vs. Smith*, 44 An. 929; *Watson vs. James*, 15 An. 386; *Calderwood vs. Calderwood*, 23 An. 653; *Groves vs. Steel*, 2 An. 480; *Payne vs. Hubbard*, 42 An. 395; *Wang & Cotnam vs. Finnerty*, 32 An. 94.

The contract in question stood upon the public records as a sale with a power of redemption, and the property had, after the period of redemption, and prior to the institution of this suit, passed from the parties who appear in the act as vendees, into the ownership and possession of a third person, who has paid, as shown by the testimony, a large price for it in cash. Whatever may be the differ-

ence of opinion as to the value of the land at the time of the contract between Miller and the Blochs, we think the latter could, beyond question, have maintained it, as a valid contract of sale, from any attack made upon it, either by Miller or his creditors, on the ground of lesion. There was nothing on the face of the deed which would have placed West on inquiry. Under such conditions he was authorized to deal with the Blochs as the owners of the land, unaffected by any secret, unknown equities between them and Miller. It would be too late now for the plaintiff, as a creditor, to attack the act for fraud, even if he could have done so against an innocent third person, who had dealt on the faith of declarations made by the vendor in an authentic act of sale, placed upon the public records, and matters have gone too far for the application of the theory of plaintiff's case to this property (assuming it to have been justified by the facts) in the hands of West, unless he could bring home directly to him knowledge of the exact situation. Plaintiff has attempted to do this, but we think unsuccessfully. Assuming that West had knowledge when he bought the property of the existence of a pending revocatory action for fraud between Turner & Oates, Miller and David and Solomon Bloch, the effect of such knowledge was done away with the moment that judgment was rendered in that case in defendant's favor. In the decree West would have found justification for having dealt with the parties when he did, in so far as that particular kind of attack was concerned, and the existence of the suit would not have conveyed to him notice of the possibility of vices in the apparent title of the Blochs of a diametrically opposite character, for the first attack admitted the reality of the sale, but attacked it for fraud, while the second would deny the sale and attempt to hold the property as never having gone out of the ownership of Miller. The necessities of the case do not require us to make any declaration as to what was really the character of the act between Miller and David and Solomon Bloch, but we think it proper to say that, in our opinion, it was precisely what it purported to be, a sale with power of redemption.

John A. Miller himself, in his answer in the revocatory action brought by Turner & Oates to set aside his sale to David and Solomon Bloch, averred that he had sold the land to them on the 25th August, 1885; that the sale was for the consideration named in the deed, which was actually paid; that the whole transaction was in

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good faith; that the possession passed with the deed, and that he remained on the place for some time after the act, but as the tenant of Bloch & Bro., to whom he was paying rent.

If the statement of George Miller, one of plaintiff's witnesses, was to be taken as showing the true facts of the case, plaintiff's position would not be bettered, for according to that witness the act was passed as a mandate to Bloch & Bro. to sell, coupled with a promise on their part, that after a sale should have been effected they would, after reimbursement of the amount due to themselves, pay over to Miller the surplus. He says that after the sale to West, he, under directions from his father, John Miller, was sent to collect the surplus arising from West's purchase, but was told by the Blochs that the price had been exhausted by the indebtedness due them by Miller. West's purchase was recognized; a money liability over from the Blochs to him was all that was claimed by Miller. This secret understanding (if it existed), inconsistent with the facts shown by the public records, did not effect West, a purchaser in good faith.

We think the judgment appealed from is correct, and it is hereby affirmed.

No. 11,758.

MRS. EMMA BROWNSON VS. WILLIAM F. WEEKS ET AL.

The wife may, after the death of the husband, ratify the act by which she had bound herself and her property for his debt during his lifetime. The nullity of such act is only absolute in this sense that she can not ratify it as long as she is under marital influence. The ratification may be express or tacit. *Lafitte vs. Deligny*, 33 An. 658.

In executed contracts which may be tacitly ratified a presumption of ratification results from silence and inaction during the time fixed for prescription.

The prescription of five years, under Art. 3542, C. C., applies to an action brought by a wife to set aside a judicial sale which had been made during her husband's life, in enforcement of a mortgage granted by her to secure his debt. *Vaughn vs. Christine*, 3 An. 330. Prescription commences, as fixed by Art. 2221, C. C., from the date of the dissolution of the marriage.

Watkins, J., Concurring. The prohibition contained in R. C. C., Art. 2398, does not apply to and is not founded upon public order. It is only a *personal statute*; founded exclusively upon the personal relations between husband and wife, and resulting from marriage under our law. It establishes an incapacity to contract, which, though absolute in a certain sense, and so long as the marital influence continues, is, like the incapacity of a minor, voidable only, and may be the subject of ratification, whether expressed or implied, after marital influence has ceased.

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A PPEAL from the Seventeenth Judicial District Court for the Parish of St. Mary. *Allen, J.*

J. Sully Martel and Branch K. Miller for Plaintiff, Appellant:

Where the legality of a transaction depends, not on the nature of the transaction but on the capacity of the party to contract, the rule as to innocent third persons has no application. 5 N. S., 55; 5 An. 495.

As to the incapacity of the wife to bind herself, that she can not be estopped; when property is sold by her in violation of the prohibitory law, under which she can not become liable for her husband's debt, the rule governing third persons does not apply. 34 An. 123; 7 N. S. 64; 31 An. 734; 34 An. 288; 15 An. 569; 1 An. 428; 36 An. 824; 32 An. 1023; 42 An. 951; 29 An. 75, 123; 37 An. 209; 24 An. 251; 41 An. 494, 649; 12 An. 853; 33 An. 1008; 14 An. 169; 9 An. 589; 2 An. 756; 33 An. 1010; 45 An. 373; 21 An. 567, 655; 28 An. 855; 8 Robinson, 435; 14 An. 587; 31 An. 684; 33 An. 170; 45 An. 75; 44 An. 880.

Gilbert L. Hall and Fenner, Henderson & Fenner, for Defendants, Appellees:

The insufficiency, or even the total absence, of judicial authorization, does not of itself involve the nullity of a contract of loan and mortgage made by a married woman with the authorization of her husband. The only effect of such absence is to shift the burden of proof on the question as to whether the loan was for the benefit of the wife's separate estate. *Darling vs. Lehman*, 35 An. 1188, and authorities cited.

Nullities in the onerous contracts of married women, resulting from the contravention of laws made solely for their protection, are not absolute in such sense as to authorize the disregard of such contracts, or to permit them to be collaterally invoked.

They are perfectly susceptible of ratification by the married woman after her disability is removed, and such ratification is a "presumption *juris et de jure* from silence and inaction during the time fixed for prescription." *Vaughan vs. Christine*, 3 An. 328; see also 13 La. 389; 5 An. 369; 18 An. 152; 33 An. 169.

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Such contracts and titles to property based thereon can not be assailed until their nullity has been judicially decreed in a direct action brought for that purpose. *Delaspere vs. Warner*, 14 An. 413; 10 La. 269; 24 An. 445; 1 An. 38; 6 Rob. 100.

This is an action for the nullity and rescission (1) of the note and mortgage of the plaintiff, a married woman; (2) of executory proceedings taken in execution thereof; (3) of the judicial sale made thereunder; (4) of the sale made by the purchaser to the defendant, Weeks. The petitory demand for the property is merely conditional and consequential on the decree of the nullities prayed for.

The action is, therefore, one "for the nullity or rescission of contracts and other acts," within the precise letter and meaning of the first clause of Art. 3542, Rev. C. C., which prescribes such actions by five years.

This prescription was suspended during the coverture of plaintiff, but began to run from her husband's death, which occurred on March 17, 1887, while the action was only brought in September, 1893. The plea of prescription was properly sustained.

It is elementary law that where suit is brought to annul a title to immovable property and there are previous titles intervening, which must also be annulled, the parties to such prior titles must be brought into the suit before the relief can be granted. Mrs. Caroline Brownson, who sold to Weeks under full warranty, held the property as purchaser at the judicial sale made under the executory proceedings on the note and mortgage of plaintiff, and is an indispensable party to this suit, in whose absence plaintiff could, in no event, recover.

A sale under executory process is a judicial sale. Weeks, whose perfect good faith is fully established and not even questioned, bought on the faith of a recorded title in his vendor derived from a judicial sale, and is entitled to the benefit of the settled rule that the purchaser at a judicial sale is not bound to look beyond the jurisdiction of the court which ordered the sale. If the court had jurisdiction to order the sale, that is sufficient. *Webb vs. Keller*, 39 An. 67, and authorities there cited.

Argued and submitted, April 9, 1895.

Opinion handed down, May 8, 1895.

Rehearing refused, June 3, 1895.

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Plaintiff brings this action for three several tracts of land, which are in possession of the defendant. She sets up title in her from one Ipigenié Frere, wife of Gabriel Leclerc Fuselier, by a donation *inter vivos*, made November 13, 1869.

That under improper marital influence, and without any consideration enuring to her or to the benefit of her separate property, but to secure a debt due by her husband she executed a mortgage to a Mrs. Catharine Stouff.

That to pay this mortgage the property now in controversy was sold, and purchased by the mother-in-law of plaintiff, who subsequently sold it to the defendant.

The District Court rendered judgment in favor of plaintiff against the defendant for the ownership and possession of the third tract referred to in plaintiff's petition, reserving to her a right of action for fruits and revenues, but sustained defendant's plea of prescription and rejected plaintiff's demand in respect to the two tracts mortgaged by her to Mrs. Stouff. It condemned defendant to pay the costs. Plaintiff appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant moves for a dismissal of the appeal, alleging that after the rendition of the judgment appealed from, which condemned the defendant to pay costs, plaintiff and appellant voluntarily executed the judgment by causing a *fi. fa.* to issue for the payment of the costs. The *fi. fa.*, which issued, was not at the instance of the plaintiff, but of the sheriff.

The appeal is maintained.

The attack made by plaintiff upon defendant's title is based upon the claim that the note and mortgage which she executed in favor of Mrs. Stouff, were null and void, for the reason that the debt which she then recognized as being a debt due by herself to the mortgagee (that for which the note was given), was due, not by her, but by her husband—that her husband was at that time already indebted to Mrs. Stouff on past transactions, and that, in and by the act of January 20, 1874, she bound herself and her property for her husband's debt, in violation of Art. 2398 of the Civil Code. That Mrs. Stouff was necessarily aware of that fact, and that third parties were placed upon their guard, as to the character of the trans-

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action, by the certificate of the judge, which was annexed to the act as furnishing evidence of the fact that she was then dealing in respect to her separate affairs. That this certificate was not only stale, it having been executed as far back as March 1, 1872, while the act of mortgage was passed in January, 1874, but there was a variance, both as to the amount to be borrowed and the property to be mortgaged. Plaintiff declares that she was made to execute the note through marital influence and coercion, and that by the same influence and coercion, and the representations made to her by her mother-in-law at the time, she was prevented from interposing legal obstacles to the enforcement of the mortgage upon her property. That her mother-in-law induced her to believe that the enforcement of the mortgage, and the purchase herself of the property, was necessary for the protection of the plaintiff from the vexatious pursuit of her husband's creditors, and her inaction was based upon a reliance of the truth of that statement. The plaintiff declares the value of the property in defendant's possession to be fifteen thousand dollars, and she avers that she is entitled to fruits and revenues at the rate of two thousand dollars per year. The prayer of her petition was that "Mrs. Catherine Stouff and William F. Weeks be cited, and that after proceedings there be judgment in favor of petitioner, decreeing that the note and mortgage * * * be decreed null and void, and that the sale of her property mortgaged, made in execution of said mortgage, be annulled and set aside; that the title of William F. Weeks be therefore annulled, and that she be decreed the lawful owner of all the property herein described, and be ordered placed in possession of the same," etc.

Mrs. Catharine Stouff answered, admitting that she knew the nature of the debt secured by the mortgage sought to be annulled, but denying all the other allegations of the petition.

Wm. F. Weeks pleaded the general issue, and set up in defence that he was a purchaser in good faith from Mrs. Caroline Brownson; that he had been in continual possession of the property ever since his purchase; that he had made valuable improvements upon the same. He pleaded the prescription of one, two, three, five and ten years against plaintiff's demand, and prayed in the event of plaintiff's recovering the land that judgment be rendered in his own favor for the improvements.

The first question which plaintiff discusses is the prescription of

five years under Art. 3542 of the Civil Code, which was invoked by the defendant. She contends that if any prescription be applicable, it is that provided for, not in Art. 3542, but in Art. 2221 of the Civil Code.

Art. 2221 of the Civil Code declares that: "In all cases in which the action of nullity or of rescission of an agreement is not limited to a shorter period by a particular law—that action may be brought within ten years. That time commences, in cases of violence only, from the day on which the violence has ceased; in case of error or deception, from the day on which either was discovered, and for acts executed by married women not authorized, from the day of the dissolution of the marriage or of the separation. With regard to acts executed by persons under interdiction, the time commences only from the day that the interdiction is taken off; and, with regard to acts executed by minors, only from the day on which they became of age."

This article is found in the Code, under the title of "Conventional Obligations;" sub-title: "Of the Action of Nullity or Rescission of Agreements," and corresponds with Art. 1804 of the Code Napoleon.

Art. 3542 is found under the special title of "Prescription," and is as follows:

"The following actions are prescribed by five years:

"That for nullity or rescission of contracts, testaments or other acts.

"That for reduction of excessive donations.

"That for the rescission of partitions and the guarantee of portions.

"This prescription only commences against minors after their majority."

It will be seen that the latter article provides a much shorter prescription for action of nullity and rescission than that fixed by the first.

It is obvious that there is some sweeping class of actions of nullity and rescission which it was contemplated should not be governed by the provisions of Art. 2221, but should be barred by the prescription of five years. The difficulty is in ascertaining to what actions Art. 3542 applies.

Appellant calls our attention to the case of Mulford vs. Wimbush,

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2 An. 443, in which this court held that an action to annul or rescind a contract on account of error, fraud or violence, was prescribed only by ten years from the day on which either was discovered, and in case of violence only from the day on which the violence ceased, and that the provisions of Art. 3507 (now Art. 3542) of the Code, applies only to cases not included in Art. 2218 (now Art. 2221). She also refers us to *State vs. Railroad Co.*, 84 An. 951.

She next claims that the present suit is purely a petitory action; that the note and mortgage, under which the property was sent to sale by Mrs. Caroline Brownson, were absolute nullities, as was the sale made in enforcement thereof; that there was no necessity to attack the sale or to make Mrs. Caroline Brownson, the purchaser at the sale, a party to these proceedings.

We are of the opinion that the note, mortgage and sale were not absolute nullities. In *Laftite vs. Delogny*, 33 An. 665, where the precise question of the character of the nullity resulting from the mortgage by a wife of her property to secure the debt of her husband was submitted to us, we declared that it might be classed as one of those which resulted from the incapacity of the wife growing out of the relation she bears to her husband. After an examination of the whole subject, we held that the mortgage which in that case had been granted by the wife was one susceptible of being ratified after the death of her husband, and that it had, in fact, been so ratified.

The court assimilated the particular contract to which the wife was forbidden to enter into without the consent of her husband, and referring to Art. 1786, Civil Code, which declares that the unauthorized contracts made by married women, like the acts of minors, may be made valid after the marriage is dissolved either by express or implied ratification, said "that in the power of ratification thus conferred it saw no distinction made in the contracts which might be ratified, and no limitation of the power to ratify to any particular class of contracts."

It is said that when the law declared that the wife could not bind herself for her husband or become surety for his debts, this was to protect her against acts resulting from her dependence on her husband, and that it would not spring into life or obtain vitality unless the wife, emancipated from marital authority, and restored to her full and complete capacity to contract, chooses in the exercise of her

freedom to ratify it, and by such ratification endow with being a contract which, up to that time, had remained dormant, or never existed. Citing the maxim, "*ratione cessante cessat lex*," the court treated the nullity in the contract as one arising from a relative nullity of "*capacity*" in the wife, and in so doing it was in accord with Fuzier-Herman under Art. 1108, C. N., citing Laurent, who says: "L'incapacité purement civile d'une des parties, au contraire, peut rendre la convention *annulable*, mais non *inexistante*; ce dernier effet ne serait produit que s'il s'agissait d'une incapacité naturelle de consentir, se confondant avec l'absence de consentement." Laurent, Vol. 15, n. 454. The same author, referring to the prescription of nullities which could be invoked under Art. 1304 of the Code Napoleon, which corresponds with our Art. 2221, says that *prescription*, when applicable, is based upon the theory and presumption of ratification or confirmation. Laurent, Vol. 19, b. 14.

We adhere to the principle announced in Lafitte vs. Delogny that a contract of this character is subject after the death of the husband to ratification or confirmation by the wife, and we think that this confirmation or ratification may, under Art. 1786, C. C., be either expressed or implied. If the contract has been executed, silence by the wife after the husband's death during the prescriptive period, would be an implied ratification.

We do not think that the nullity of the contract was such as to make it absolutely non-existent; it simply, during marriage, remained without effect. It was not of that character which "the law would always and constantly resist." Art. 11 of the Civil Code says, that "individuals can not, by their conventions, derogate from the face of laws made for the preservation of public order or good morals. But in all cases in which it is not expressly or impliedly forbidden, they can renounce what the law has established in their favor when the renunciation does not affect the rights of others, and is not contrary to the public good."

We think the law relative to a wife's not binding herself or her husband's property was enacted specially in her interest and only remotely in that of the public. *Primario spectat utilitatem privatam secundario publicam*.

Art. 2305, C. C., referring to payments made by parties says: "That which has been paid under a void title is also considered as not due." If the widow of John Brownson had, after his death,

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finding this note of hers executed during marriage still outstanding, gone forward and paid it, we do not think it would be contended that she would be entitled to the action in repetition which she would have had for a payment made by her in virtue of a *title absolutely void*.

The only attack made upon the sale in this case is the claim of the absolute failure of the basis upon which it rested the note and the mortgage. The proceedings themselves are not attacked. We think it was essentially necessary that the present action should have been brought in order to replace matters as they stood prior to the sale. The vice which attached to the original contract of mortgage was not absolute nor patent on the face of the record, but required, in order to bring it to light, proof of extrinsic facts. Mrs. Emma Brownson, the plaintiff, was a party to the act, and she could not ignore that fact—the fact that the contract had been executed years before through a judicial sale in enforcement of the mortgage, and the property was in the hands of a third possessor, claiming ownership. She could not bring a direct petitory action for the property, as she could have done, had her husband sold her property himself in order to pay his debt, or it had been sold in execution of a mortgage which he had placed upon it for that purpose. It was necessary that the sale at which Mrs. Caroline Brownson became the purchaser, should be set aside before Weeks, the subsequent purchaser of the same, could be reached, and to that end it was essential that Mrs. Caroline Brownson should have been made a party. Defendant is correct in saying that the present action is primarily an action of nullity or rescission, and that in so far as it is petitory, it is only consequentially so. Plaintiff went into the suit upon a contrary hypothesis, without proper parties and pleadings, at her own risk.

If the plea of prescription invoked by the defendant be sustained it will dispose finally of the case.

We endeavored to examine the record in the case of *Mulford vs. Wimbush*, 2 An. 443, to which counsel for plaintiff has referred us, with a view of ascertaining the character of the contracts involved therein, the precise circumstances under which it was brought, and the nature of the pleadings, but found that unfortunately it had been placed as among the "missing records of the court." It seems to be the only decision really bearing upon the question before us. Several others have incidentally referred to the prescriptions under Arts.

2221 and 3542, but the remarks made do not seem to have been necessary for the purposes of the cases before the court, either because other and shorter prescriptions were pleaded which were determinative of the issues, or because the facts of the cases making the longer prescription (of ten years) applicable, it was important to refer specially to the shorter one of five. We have, in view of the importance of the question, examined it with care.

When the framers of our Code reached the subject of the extinguishment of obligations, they assigned "nullity and rescission" as one of the manners in which this was brought about. Among the articles making up that sub-title, they placed the present Art. 2221 (formerly Art. 2218), corresponding with Art. 1304 of the Code Napoleon. They were not dealing with the subject of "prescription" at that time; that was a subject *thereafter* to be taken up. They were uncertain what the final condition of the law on that subject would be, and in our opinion Art. 2221 was simply intended to reach cases which might escape from other provisions of the Code. They however announced as a general rule that whatever might be the prescription fixed for cases wherein error, violence, or deception might be assigned as the causes for actions of rescission, and whatever might be that for setting aside acts executed by persons interdicted, acts executed by married women not authorized, or minors, the starting point for prescription should be as announced in Art. 2221. If the court, in 2 An. 443, reached the conclusion that the prescription of Art. 2221 had to be adopted in that case in order to give the plaintiff the benefit of the period fixed therein for the commencement of prescription, for the reason that Art. 3542 was silent on that subject, we think the court erred. The second and third paragraphs of Art. 2221, though not repeated in Art. 3542, were none the less carried over into the latter article. We do not think that, in order to reach those particular provisions of the law, it was necessary that actions of nullity or rescission, based on fraud, error, violence, minority, interdiction or incapacity of women from want of authorization, should have been held to have been brought under the prescription of ten years. To do this would practically be to wipe out Art. 3542, which is as sweeping in its terms as it is possible to be in making five years the period for prescription for actions for the nullity or rescission of contracts. These particular causes are precisely those on which such

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actions are generally based. They furnish the foundation usually for setting aside what are known as voidable contracts.

In our opinion the prescription of ten years applies to a different class of cases. It reaches those where contracts, perfect and complete on the face of the act evidencing them, are attacked as absolutely null and void in order to have them so decreed through proof of extrinsic facts establishing the absence of one of the elements essential to the very existence of the contract, for instance, a contract of sale or exchange where one of the things exchanged or the thing sold was found to have had no existence at the date of the contract. The State vs. Railroad, 34 An. 951, referred to by plaintiff, is an illustration of such a suit. In succession of Wilder, 22 An. 219, the prescription of five years was successfully pleaded against an attempt made to avoid after maturity a marriage contract made during minority, the court holding that the contract was not void, but voidable.

In the case at bar, we think the evidence shows unquestionably that the plaintiff was in a position at one time to have repudiated the contract she made or to have undone the sale made under it. She permitted the mortgage to be foreclosed and the property to be judicially sold in its enforcement. She is not before us seeking to ward off an impending injury upon an unexecuted contract, but as a plaintiff seeking to undo, long after the rights of third parties have become involved, the harm which timely action on her part could have either avoided or minimized.

In Vaughan vs. Christine, 3 An. 330, this court, after citing Toulhier as saying: "En un mot nous ne connaissons point de nullité fondée sur l'intérêt privé qui ne puisse être réparée par la ratification expresse ou tacite. Le vice le plus absolu des conventions, le défaut ou la non-existence du consentement, peut néanmoins être réparé par la ratification, soit expresse, soit tacite," declared that "in all executed contracts which, under this view of the law may be tacitly ratified, a presumption, *juris et de jure* of ratification, results from silence and inaction during the time fixed for prescription, and held that plaintiff's action was barred by the prescription of five years pleaded. No legal impediment has for six years stood in the way of Mrs. Emma Brownson bringing an action in nullity. She permitted the defendant to continue for years in the possession of the property, making valuable improvements and making outlays,

many of which he could not now recover. The nullity which she invokes was a relative one in her own interest and subject to ratification. We think that law and equity unite in authorizing us to say that her long silence has resulted in barring an attack upon defendant's title. Matters have gone too far to be now remedied. "*Mulla fieri prohibentur quae si facta fuerent firmitatem.*" We think the judgment appealed from is correct, and it is hereby affirmed.

CONCURRING OPINION.

WATKINS, J. From the record it appears that the plaintiff executed an act of mortgage upon her separate property to secure the payment of her note for one thousand five hundred dollars in favor of Mrs. Catherine Stouff, on the 20th of January, 1874, and that the said indebtedness was that of her husband—the judge's certificate of authorization being appended to the act.

Shortly afterward Mrs. Stouff assigned the note to Mrs. Caroline Brownson, mother of the plaintiff's husband, and she foreclosed the mortgage and purchased the property on the 5th of September, 1875, and conveyed it to the defendant on the 24th of September, 1880.

The grounds of nullity assigned by the plaintiff are, (1) that the mortgage was granted to secure the indebtedness of the husband; (2) that it was secured and maintained through the marital influence of her husband.

The judge held that the defendant was a purchaser in good faith; but that inasmuch as no prescription runs between husband and wife, it did not begin to run until after the death of plaintiff's husband in the year 1887; and, consequently, the period of time necessary to found defendant's title by prescription *acquirendi causa* (R. C. C., 3478) had not elapsed at date suit was filed. R. C. C., 503.

But he gave effect to the defendant's plea of five years' prescription *liberandi causa* (R. C. C., 3542), which declares that an action for "the nullity or rescission of *contracts*, testaments, or *other acts*," "are prescribed by five years." (Our italics.)

There is no question about the regularity of the executory proceedings and judicial sale to Mrs. Brownson, the only claim that the plaintiff makes in reference thereto being that she made it under the false representation that it was to protect the property from other creditors of the husband of plaintiff.

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On this state of the case there is but a single question presented for solution, and that is whether plaintiff's action to annul the act of mortgage is barred by the five years' prescription *librandi causa*.

Her suit is intended to procure her release from the effect of her promise to pay her husband's debt, and to procure the revocation of the act of mortgage she consented as a security therefor.

Her theory is that the nullity of those acts being absolute, it draws to them the nullity of the subsequent acts of sale, judicial and conventional.

The Code declares that "the wife * * * can not bind herself for her husband * * * for debts contracted by him before, or during the marriage." R. C. C. 2398.

It is on the prohibition which that article contains that plaintiff mainly relies, and the success of her pretensions necessarily turns upon the character of the nullity therein denounced—whether absolute or relative.

For, if absolute, the argument is that the nullity is incurable; not subject of ratification or prescription. While, on the other hand, it is that, if relative only, the converse of that proposition is true, in every particular. That, if absolutely null, it was so *ab initio*, and never produced any legal results. That prescription can not create a right nor make an obligation.

Plaintiff's contention is that the mortgage was an absolute nullity, and that its nullity permeates and renders void the subsequent transactions."

But her further contention is, that if the act be only relatively null, the prescription of ten years, prescribed in R. C. C. 2221, controls, instead of that of five years, as prescribed in R. C. C. 3542 (3547).

The case of Lafitte vs. Delogny, 33 An. 659, presents conditions quite similar to those presented in this case, and involved the nullity of an act of mortgage by a wife given to secure a debt of her husband, and subsequent foreclosure and sale of the property mortgaged, the same having been ratified by the surviving widow after the demise of her husband, in a written act of ratification, "*and by her silent acquiescence in the proceedings and sale she again ratified the contract on which they were based.*"

On this hypothesis the court propounds this question, viz.:

"Admitting that the debt originally was the debt of her husband,

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which she thus ratified and promised to pay, did such ratification create any legal obligation on her part, and make the debt a valid debt against her from the time it was made?

“In other words, was the mortgage given by her for the debt of the husband—conceding it to be such—a nullity so absolute and radical as could not be ratified by her *after* the death of her husband, and she was thus freed from marital influence?”

The same question confronts us here, although the ratification of the wife's prohibited contract rests alone upon “her silent acquiescence in the proceedings and sale.”

In making reply to that query, the court held and maintained the principle that under our law, as under the French law and jurisprudence, there are two distinct and different kinds of absolute nullities in matters of contract; (1) those resting upon motives which are violative of good morals or public policy; (2) those resulting from the incapacity of persons to enter into contracts of any kind.

Of the former they say it is a nullity, “so absolute and radical that the law always and constantly resists it, and makes and declares it non-existent, and not susceptible of ratification;” and of the latter they say that, though dormant and *non-enforceable* during the continuance of the incapacity, yet same may become the subject of ratification, after the incapacitated person has been relieved of her disability. *Vide* Dunod Traite de Prescrip., Ch. 8, p. 47; Toulier, Vol. 4, p. 533; Vaughan vs. Christine, 3 An. 328, quoted in Lafitte vs. Delogny.

The court, in applying those principles to the facts of that case, say:

“The nullity charged respecting the act of mortgage executed by Mrs. Delogny in favor of her son in this case, may be classed among the nullities which result from the incapacity of the wife growing out of the relation she bears to her husband;” and “it is evident that when the law declares that the wife can not bind herself for her husband, or become security for his debts, this was to protect her against acts resulting from her dependence on her husband.”

The reason assigned for this rule of law is, that it operates a protection to the wife's separate property.

This dual principle is fully recognized and sanctioned by our Code. For while, in Art. 11, it is declared that “individuals can not, by their conventions, derogate from the force of laws made for the

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preservation of public order and good morals;" and in Art. 12 it is declared that "whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed;" yet, it is further declared in Art. 1790, that "besides the general incapacity which persons of certain descriptions are under, there are others applicable only to certain contracts, either in relation to the parties, such as husband and wife, tutor and ward, whose contracts with each other are forbidden; or in relation to the subject of the contract, such as purchases by the administrator of any part of the estate which is committed to his charge, and the incapacity of the wife, even with the assent of the husband to alienate her dotal property, or to become security for his debts."

Special significance attaches to this article in view of the fact that it is found in the chapter of the title "of Conventional Obligations" which treats of the parties to a contract and their incapacity to contract.

Reading those two articles together, the conclusion is clear that the court correctly held the nullity in the contract of Mrs. Deligny to be one which resulted from her incapacity as a wife; and it is equally evident that the prohibition of Art. 2398 is not one which comes within the purview of Art. 11, and hence an engagement in violation of it does not result in an absolute nullity which derogates from the force of laws made for the preservation of public order or good morals.

The court in that case say that the contract of the wife in such case "may be assimilated to other contracts which the wife is forbidden to enter into." Citing Art. 2397, and making the following comment, viz.: "They"—Arts. 2397 and 2398—"seem to stand on the same footing; and, it is worthy of note that Art. 2397 forbidding the wife to sell her immovables, and Art. 2398, containing the prohibition against her binding herself for her husband's debts, constitute of themselves one section, and is entitled 'of the wife's incapacity to alienate her immovables, or to bind herself for her husband,' and therefrom draw the inference that the two are of the same general character * * * Now, it will hardly be questioned that a married woman who sells her immovables without the authority of her husband can ratify such sale after the dissolution of the marriage, yet the *same terms of prohibition* are used in both articles."

In confirmation of this theory, Art. 1786—which is found in the same section of the Code as 1790 *supra*—declares that “the unauthorized contracts made by a married woman, like the acts of minors, may be made valid after the marriage is dissolved, either by *express or implied ratification.*”

The principles on which the opinion in the Delogny case is predicated are sanctioned and supported by numerous prior adjudications of this court. In fact, I have not been able to find any well considered case holding that such prohibited contract of a wife was not susceptible of tacit ratification after she is released from the restraints of marital authority.

As the decisions on this and kindred questions cover a wide range, and embrace a variety of judicial opinions, I will only make a few quotations from those best expressing the jurisprudence of this court in the premises.

In *The Augusta Insurance and Banking Company vs. Morton*, 3 An. 417, the court, speaking through Eustis, C. J., said:

“The article of the Code which provides “that the wife can not bind herself for the debts of her husband, according to the doctrine of the civilians, is a *personal* statute. It is founded exclusively on the personal relation between the husband and wife, resulting from marriage under our laws, and, of course, is confined in its operation to married persons within our jurisdiction.

“True, it establishes an incapacity to contract, but this incapacity is merely relative, and it is settled by our jurisprudence that a wife can not be relieved from the effect of a contract by which she became the surety for her husband, if the debt itself inured to her benefit. The disability to contract exists only in a certain contingency, and that contingency is strictly personal. The incapacity of a married woman to contract is of the same character as that of a minor, and the laws creating those incapacities have always been classed among those which are called *personal*.

* * * * *

“This article, R. C. C. 2398 (2412) * * * renders voidable contracts made by married women in certain cases, by reason of the consideration which it holds to be in conflict with the relations of husband and wife.” Citing: 1 Duranton, Secs. 79, 80; *Sirey's Rep.* 19, 2, 140; *Traité des Personnes* par Prudhon, Ch. 5, Sec. 1.

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The same principle is affirmed in *Bisland vs. Provosty*, 14 An. 169, in the following statement, viz. :

"Under our Art. 2412, which is confined exclusively to the contracts of married women, it is supposed that the wife may be induced to sign a contract injurious to her rights under the marital influence."

It has been frequently held that a promise to pay a debt of the husband for which the wife had become security, made by the surviving widow subsequently to his death, was binding on the latter. *Succession of Guidry*, 4 An. 488; *Gunst vs. Brull*, 7 An. 649.

In *Medart vs. Fasnatch*, 15 An. 621, it was said of a married woman's contract of suretyship for her husband, on which a judgment had been rendered, that "*as long as the disability lasts* a judgment obtained against the man and wife * * * is liable to the same objection as the obnoxious obligation."

In *Barron vs. Sollibellas*, 26 An. 289, it was held to be competent for a married woman to make a transaction and compromise of a lawsuit, and that she can not afterward "be listened to when saying that the debt on which she was sued was a debt of her husband." *Thornhill vs. Bank*, 34 An. 1171; *Sentell vs. Stark*, 37 An. 679; *Calhoun vs. Lane*, 39 An. 594.

In the *Bank of Lafayette vs. Bruff*, 33 An. 624, it was held that a married woman, who has bound herself towards an innocent third person as surety of a party between whom and her husband there existed a secret partnership, can not afterward plead, as against such third person, that by her contract she had promised to pay her husband's debt.

That principle was subsequently affirmed in *Chaffe & Sons vs. Watts*, 37 An. 324.

And in treating of the wife's prohibited contract of security for her husband this court expressly declared in *Chaffe vs. Oliver*, 34 An. 1008, that:

"Of course, these doctrines have their limitations when they involve the rights of innocent third persons, who have acted in good faith upon the apparent validity of such transactions."

And one of those limitations is specified in *Henry vs. Gauthreaux*, 32 An. 1103, in these words:

"While the law and the jurisprudence have, at all times, favored married women in the assertion and vindication of their rights, they

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have never intended, and do not contemplate, the perpetration of fraudulent practices for the accomplishment of villainous objects, by which to enrich themselves gratuitously at the expense of their unguarded and trusting neighbor, on whom equity keeps a watchful eye." R. C. C. 1965.

These various illustrations will serve to show most conclusively, I think, that the prohibition contained in R. C. C. 2398 (2412) against which the present suit is leveled, does not apply to, and is not founded upon public order or good morals; but that article is only a *personal statute*, founded exclusively upon the *personal relations between husband and wife, and resulting from marriage* under our law. That it establishes an incapacity to contract, which, though absolute in a certain sense, and so long as the marital influence continues, is, like the incapacity of a minor, voidable only, and may be the subject of ratification, whether express or implied, after marital influence has ceased.

This being the character of the nullity which this article denounces, the reprobated contract is prescriptible, especially in respect to third persons who have transacted and dealt with the property affected by it on the faith of the public records on which the contract has remained unimpeached during a prescriptible period of time.

In *Vaughan vs. Christine*, 3 An. 328, the court held the prescription of five years under R. C. C. 3042 (3507) applicable to such a nullity, as the one in this case is defined to be. The substance of that decision is: That absolute nullities are of two kinds: (1) Those resulting from stipulations derogating from the force of laws made for the preservation of public order or good morals, (2) and those established for the interest of individuals. "The former are not susceptible of ratification, and the prescription of five years, under Art. 3507 of the Code, is inapplicable to them; but if, by subsequent dispositions of law or by the succession of time, such stipulations cease to be illegal, they may from that time be ratified and become subject to the prescription of Art. 3507 * * * But in relation to absolute nullities established in the interest of individuals, the rule is, as to onerous contracts, without exception, that the party in whose favor they are established, may ratify the contracts, either expressly or impliedly.

"In all cases of executed contracts susceptible of tacit ratification,

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a presumption of ratification *juris et de jure* results from *silence and inaction during the time fixed for prescription.*" (My italics.)

In Succession of Wilder, 22 An. 219, it was held that a voidable antenuptial contract of a minor was binding on her, if not *disaffirmed by her within five years after she was relieved of her disability*; and the court applied the prescription of five years under R. C. C. 3542 (3507).

But we find the strength of the rule stated *contra* in Provost vs. Provost, 13 An. 574, wherein the prescription of five years, under that article, was held not to apply to a will that was absolutely void, because it contained a prohibited substitution. Lagrange vs. Barre, 11 R. 313, to same effect.

In so far as the contention that the prescription of ten years, under R. C. C. 2221 is alone applicable, is concerned, it was ruled differently in Mulford vs. Wimbish, 2 An. 443. In that case the court had under consideration and construed the apparently conflicting provisions of R. C. C. 2221 (2218) and 3542 (3507) and said:

The former "relates to cases of error, fraud or violence in agreements which are expressly included in it. If Art. 3507 intended the same class of cases, there would be two terms of prescription applicable to them by the same legislation in the same code, etc. * * *

But we do not give such an interpretation to Art. 3507. We consider it applicable only to cases *other* than those provided by Art. 2218, and thus give effect to both articles. It will be observed that such appears to be the evident sense of Art. 2218, which presupposes *other* provisions concerning the prescription against the action of nullity and rescission of agreements than that which it establishes."

In George vs. Lewis, 11 An. 654, the court said:

"The action of rescission or nullity of contracts lies only for an alleged vice inherent to the contract itself, tainting it *ab initio*," in order to bring it within the operation of C. C. 3507. Barnebe vs. Snaer, 18 An. 148.

While, on the contrary, the nullity resulting from a want of due form is barred by the prescription of ten years. State vs. Martin, 2 An. 715; Calais vs. Sembre, 10 An. 684; Ross vs. Ross, 3 An. 536.

From all of which I think it clearly results that the plaintiff's suit is prescribed by five years, and that the judgment appealed from should be affirmed.

No. 11,805.

THE MAYOR AND CITY COUNCIL OF MONROE VS. THE POLICE
JURY OF OUACHITA PARISH.

Where the State adds territory to a political subdivision, it is not within the power of the latter to so fix the boundary as to exclude from its limits a part of the territory intended to be added to the municipality.

When the State directs the extension of a street to a certain point, to embrace the added territory, the street must be continued in its length in the direction to which it points and to its destination designated by the legislation. It can not be deflected, unless there are physical obstructions which make it necessary, so as to reach the point in the most direct line.

Local self-government is guaranteed under our political system, in or out of a municipality, and the municipal organization as such has no significance as an organization for the preservation of vested political rights. In European countries franchises and privileges to a municipality are secured by contract between lord and dependant; with us it is a creation of positive law, and in furtherance of the general administration of the State, it is subject to legislative will. No vested right can be acquired by a municipal organization by its own act, by the consent of another to said act, or by opposition thereto, as against the paramount authority of the State.

A PPEAL from the Fifth Judicial District Court for the Parish
of Ouachita. *Munholland, J., ad hoc.*

Thomas O. Benton, City Attorney, and *F. G. Hudson* for Intervenor, Appellants, cite 45 An. 1024; 33 An. 1198; 7 Texas, 288; 10 Peters, 784.

Stubbs & Russell for Defendants and Appellees.

Argued and submitted, May 13, 1895.

Opinion handed down, May 20, 1895.

Rehearing refused, June 6, 1895.

The opinion of the court was delivered by

MCENERY, J. This is an injunction proceeding instituted by the plaintiff city against the defendant parish to restrain the latter from exercising jurisdiction, in the way of collecting licenses and taxes over certain territory, which the city claims is within her limits, in pursuance of Act 81 of 1873, fixing the southern boundary line of the city. After the passage of this act the city caused a survey to be made and

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the boundary ascertained, and by ordinance of the council adopted the same. Believing this to be an error, the city caused two other surveys and maps to be made.

Under both maps and surveys the city exercised jurisdiction without complaint from the parish until 1894, when it was last resurveyed by the parish surveyor. The parish now claims that the boundary first established by the city was a true interpretation of legislative intent, as it was contemporaneous with the act, and as it was a local matter, and as the State is not particularly interested, the city is concluded by her act and estopped from denying the boundaries first established.

It is immaterial what construction either party placed upon the act fixing the boundaries, and it is equally unimportant which political subdivision exercised jurisdiction over the disputed territory. There are no such doubts and uncertainties in the act that a resort to contemporaneous construction must be resorted to; nor is the act so ancient that we must look to custom and usage for its interpretation.

In nearly all European countries the rights and privileges, the civil franchises of municipalities owed their origin to treaty or contract between lord and dependent. Vested political rights are acquired by such treaties and contracts. Local self-government is guaranteed under our political system, in or out of a municipality, and the municipal organization as such has little or no special significance as an organization for the preservation of vested political rights. It has none. It is the creature of positive law, erected into a geographical and political subdivision in aid of and in furtherance of the general administration of the State.

It is subject to legislative will, and can be controlled, under and subject to the organic law. It can be extended, diminished or destroyed in its geographical limits, as well as it can be granted greater power, which can be withdrawn, in the exercise of political administration. Therefore, in the extension of the limits of the city, and fixing its boundary, neither the city nor the parish in which the town is located can by any act place an interpretation upon the legislative will that could either extend or diminish the area intended to be embraced by the act fixing the boundaries of the subordinate geographical and political division.

No vested right can be acquired by a municipal organization by its

Mayor and City Council vs. Police Jury.

own act, or by the consent of another to said act, or by opposition thereto, as against the paramount authority of the State.

The act of the Legislature to be interpreted is as follows:

Act 81, of 1873, fixed the southern boundary of the city in the following language:

"Commencing at a point on the east bank of the Ouachita river, 1140 feet south of the upper line of the plantation of Mrs. Nancy Bry, deceased; thence eastwardly to a point intersected by the eastern line of the extension of Jackson street, as extended, to the south line of Bry avenue, according to the survey of Frank Moore, surveyor of Ouachita parish; thence by an extension of the said Bry avenue in an easterly direction to the east bank of Young's bayou."

There is no contention on either side that the disrupted line should run due east. The contention is as to what particular direction the line should run toward the east. Both lines reach Young's bayou toward the east, the one insisted upon by plaintiff bearing north 73 deg. east, and that by the defendant north 52 deg. and 45 seconds.

The line claimed by plaintiff runs nearly due east in the prolongation or extension of Bry avenue, without deflection.

That which the defendant asserts as the true line deflects at Jackson street, and turns to such an extent as to make an angle at that street. This deflection, however, makes the prolongation of Bry avenue parallel with the streets of the city in the older additions. But we do not think this fact can control the legislative will. It was new territory being added to the city, and we must look more to the area intended to be annexed than to the intention of preserving the beauty and symmetry of the streets and the exact proportion or size of the squares.

The defendant contends that under the act, the broad meaning of the word "extension" would justify the prolongation of Bry avenue as insisted upon by the parish.

Extension signifies enlargement in any direction, in length, breadth, or circumference. The extension, of course, is always in the direction of the lateral sides. To extend a street means its prolongation and continuance in the direction to which it already points, unless it appears that the change in its direction has been authorized. *South Boston R. R. Co. vs. Middlesex R. R. Co.*, 121 Mass. 485.

Insurmountable physical objects may compel a deflection, but it

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must resume its course in the direction to its objective point. It is admitted that there are no physical obstructions in the way of extending Bry avenue on the line, north 73 east to which it pointed when the act was passed directing the extension of said avenue. The meaning of the act then is very plain. It authorized and directed the continuation of Bry avenue north 73 deg. east.

How can it be said to mean that the direction of the street or avenue must be changed so as to run north 52 deg. and 45 seconds east?

This is not a contract or agreement between two independent sovereignties, as to territory, which is to be interpreted by the manner in which the same has been executed. Therefore, there is no application to the case of some of the authorities referred to by the defendant. It is an act of the Legislature adding territory to a political subdivision of the State, and we are to determine what direction the State intended to give to an existing street in order to embrace the territory intended to be annexed.

We are of the opinion that the words "thence by an extension of the said Bry avenue in an easterly direction to the eastern bank of Young's bayou" meant that the avenue should be continued on its existing line north 73 deg. east until it reached Young's bayou.

It does not mean, as contended by defendant, that Young's bayou was to be reached by the avenue in the most direct line, for the reason that the Legislature did not say so, and in doing so the avenue would have a deflection, forming an angle at its intersection with Jackson street, making a difference in its easterly direction of some 21 deg.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered that the injunction herein be perpetuated, defendant to pay all costs.

No. 11,623.

J. P. MAHONEY & CO. VS. THE RECTOR, WARDENS AND VESTRY
OF ST. PAUL'S CHURCH.

Notwithstanding the stipulation in a building contract, that builders shall not be entitled to demand and receive the final balance due them on the contract price until they shall first procure from the architects in charge of the work

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a certificate that the edifice has been completed according to contract and accepted by said architects, the builders may sue the owners for the balance due, after having put the architects in default by demanding certificates from them, after the completion of the work—their only objection being that the full amount due the sub-contractors and material men had not been paid, although same had been provided for by the builders, to be paid out of the amount due.

When the building contract provides that in case of delay in the completion of the structure by a certain fixed date, the builder shall pay a forfeit of a certain sum daily during the period of default, other provisions of the contract must be examined and compared, in order to determine upon whom—from the general tenor and provisions of the contract—the fault is imposed in causing the delay in the completion of the building.

When those other provisions disclose that the builders are to furnish the materials and perform the work, and the architects are to furnish the plans and specifications and superintend the work, it is an easy matter to show by evidence whether the delay in the completion of the work was caused by the fault of the builders or the architects, and judgment will go accordingly.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Harry H. Hall for Plaintiff, Appellee.

Merrick & Merrick for Dewar, Grandison & Co., Intervenors, Appellees.

James McConnell and *Walker B. Sommerville* for Defendants, Appellants.

Argued and submitted, January 30, 1895.

Opinion handed down, March 11, 1895.

Rehearing refused, June 3, 1895.

The opinion of the court was delivered by

WATKINS, J. The plaintiffs claim of the defendants ten thousand and thirty-three dollars and fifty-four cents, per detailed itemized account, as the net balance due them on their engagement to erect and complete a church edifice on their property at the corner of Camp and Gainnie streets, in the city of New Orleans, after deducting all cash payments received and other credits to which they are admittedly entitled.

It is alleged that by a written contract made with the defendants,

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who were represented by their duly constituted agent, H. P. McDonald, petitioners undertook to furnish the labor and material, and to erect and complete St. Paul's church for the price of sixty thousand four hundred and eighty seven dollars and fifty cents, and upon the terms and conditions therein specified.

They aver that they did furnish the labor and material and did erect and complete said church edifice within the terms and conditions of said contract in every respect, and that there remains to them unpaid the balance aforesaid.

They further represent that defendants unjustly and arbitrarily withhold said sum from them, "urging as a pretext for such refusal that under said contract they are not bound to pay except upon the certificate of the architects named in said contract, viz.: Messrs. McDonald Bros.," and they aver that "the senior and controlling member of said firm of McDonald Bros., who, in said contract, is the agent of the defendants," and "said architect and agent of the defendants arbitrarily, illegally, and without justification, refuses, in spite of due demand, to furnish to petitioners the certificate to which they are entitled, assigning as a reason for declining to furnish such certificate that petitioners have failed to pay all of their indebtedness to their sub-contractors and material men, as they were in law and duty bound to have done. But the petitioners further represent and show that the amount they are due to sub-contractors and to material men is much less than the balance they have claimed, and they have authorized the defendants to pay said amounts and deduct the amounts thus paid from the sum that is due to them on settlement.

The defendants appeared and filed an exception of no cause of action, and no right of action, annexing thereto a copy of the building contract which is referred to in plaintiff's petition as part thereof.

Dewar, Grandison & Co. intervened and alleged that J. P. Mahoney and the defendants are indebted to them in the sum of three thousand and eighty-five dollars and thirty-eight cents for this, viz.: that they contracted with the firm of J. P. Mahoney & Co., plaintiffs, to do the brick, stone and concrete work, and to make the excavations for the building of St. Paul's Church, for the sum of thirty-five thousand four hundred and seventy dollars. That, in addition, they subsequently agreed to do certain extra work for the sum of two hundred and forty-two dollars and ninety-eight cents, making the

entire contract price thirty-five thousand six hundred and sixty-two dollars and ninety-six cents, which is subject to a credit of thirty-two thousand five hundred and seventy-seven dollars and sixty cents, leaving due the balance above specified.

They show that their contract with John P. Mahoney & Co. was duly registered according to law when entered into; and that since the work was completed a sworn statement has been recorded showing the amount due them by John P. Mahoney & Co. and the defendants to be four thousand eight hundred and thirty-five dollars and thirty-eight cents, since which time a partial payment has been made, reducing it to the amount now claimed.

They allege that they have, under the law, a lien and privilege, as builders and contractors and furnishers of material, upon the building erected and constructed, which has been accepted and used, and is now in the use and occupancy of the defendants. Their prayer is for personal judgment against the defendants and the recognition and enforcement of their privilege.

To the intervention the plaintiff's answer is a general denial, except in respect to defendants having taken possession of the church edifice, which they affirm to be true.

Plaintiffs supplement their petition and allege that, since filing suit they have made, at the request of the defendants, certain repairs on the church edifice which they were under no obligations to make, and which were caused by the defective plan of said building or through the carelessness of other people over whom they had no control, and for whom they were not responsible in any way.

They further allege "that said building was thereby put in a condition completely satisfactory to the defendants, who took possession thereof, and are using the same without any cause of complaint and without pretending that there are any imperfections or insufficiency in the work," etc.

The defendants first tendered an exception of no cause of action to the petition of intervention.

Both exceptions having been overruled, defendants filed an answer to the plaintiffs' original and supplemental petitions.

They admit that they entered into a contract with the plaintiffs, wherein it was agreed between them that plaintiffs should build for them a church edifice "under the supervision and control of Messrs. McDonald Bros., architects, for the sum of sixty thousand four hun-

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dred and eighty-seven dollars and fifty cents, in accordance with certain plans and specifications therein referred to," a copy of which is annexed thereto.

They then allege that they "stand upon this contract in all of its parts, and they invoke the terms thereof, as a law of the parties thereto, and they now plead the same and ask that the contract in its every part shall be performed in its entirety."

They then aver that plaintiffs are estopped by the terms of said contract from demanding final payment of any amount that may be due under it:

1. Because the building has not been completed and finished in a good, workmanlike manner.

2. Because they have not furnished and produced a certificate from the architects of the building, McDonald Bros., certifying that the payment is due.

3. Because they have not furnished proper evidence that there is no mechanic's lien upon the work, or that all claims for which the building could be held liable have been paid.

Further answering, defendants aver that they are not indebted to plaintiff in any amount whatever, for the reason that under paragraph 2 of the contract they were only obliged to pay plaintiffs "eighty-five per cent of the amounts shown to be due by the certificates to be issued by the architects during the time of the construction of the building," and also that defendants "were to retain seven and a half per cent of the amount certified to be due in their hands, until the building had been accepted as completed by the architects, and the other seven and a half per cent. for sixty days after acceptance."

They then "allege that the building has never been accepted by the architects, who, alone, are vested with authority to receive it when the work is complete," etc.

They "plead said clauses of the contract and the refusal of the architects and defendants to accept the building as completed in bar of plaintiff's claim."

They further represent "that by the terms of paragraph 6 of the contract * * * it was agreed between the parties thereto that should plaintiffs fail at any time to comply with any conditions of said contract, the architects might cause any payment to be withheld until the architects were satisfied," and that having failed to com-

ply with the terms of the contract, they are estopped from making any claim against them now.

They then set up against plaintiffs a reconventional demand, as follows:

That by the terms of paragraph 11 of the contract it was stipulated and agreed that the plaintiffs should complete the building before the 23d of June, 1892, and for any delay of completion the plaintiffs should pay the defendants at the rate of fifty dollars *per day*, to be deducted from the amount that might be due them thereunder. They aver that plaintiffs failed to complete the building on June 23, 1892, and it is still uncompleted, and that by reason of said failure they owe defendants the sum of twenty-nine thousand and fifty dollars, that is to say fifty dollars *per day* from the 23d of June, 1892, to date of filing answer—covering a period of five hundred and eighty-one days—and that amount should be deducted from any sum due them under the contract.

They further pray that the said sum of twenty-nine thousand and fifty dollars should be increased at the rate of fifty dollars *per day* for every day which the building may remain in its present incomplete condition.

Their prayer is for judgment in defendants' favor over against the plaintiffs in the sum of twenty-nine thousand and fifty dollars, reserving their right to sue for any additional amounts that may become due.

The defendants' answer to the intervention is a general denial.

On the trial there was judgment in favor of the plaintiffs and against the defendants, for the sum of nine thousand six hundred and twenty-three dollars and fifty-four cents, with five *per cent.* interest from the 26th of October, 1893, subject to a credit of two thousand seven hundred and twenty-three dollars and thirty-eight cents, as the amount now due to the sub-contractors of the plaintiffs, Dewar, Grandison & Co., reserving to the plaintiffs their right to sue the defendants for damages.

It was in favor of the intervenors, and against the defendants, for the sum of two thousand seven hundred and twenty-three dollars and thirty-eight dollars, with legal interest from judicial demand, reserving them their right to sue defendants for extra work performed and materials furnished them.

From that judgment the defendants have appealed.

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Analyzing the pleading, as outlined in the foregoing extracts, we find the following to be a fair summary thereof:

All parties admit that plaintiffs contracted to build a church edifice for the defendants at an agreed price, and upon certain terms specified in the contract.

It is affirmed by the plaintiffs that their right to sue is denied by the defendants, on the ground that they are not bound to pay except upon the certificate of McDonald Bros., architects, and this is likewise asserted by the defendants.

It is alleged by the plaintiffs, that the refusal of the architects to furnish them with a certificate that the residue of the price is due was an arbitrary and illegal act on the part of the said architects, the senior member of which firm was the agent of the defendants at the time. And the defendants having assigned as the reason why the architects withheld their certificate, that plaintiffs had not paid all their indebtedness to the sub-contractors and material men, the plaintiffs aver that the amount due to said sub-contractors is much less than is due to them, and they have authorized defendants to pay said amounts and deduct same from the amount due on settlement. And whilst neither denying nor affirming that averment, the defendants specially invoke and urge against the plaintiffs the stipulations of the contract as an estoppel, and as disclosing no cause of action; and subsequently admit that they contracted with defendants to build for them a church edifice under the control and direction of McDonald Bros. as architects, without disavowing that the senior member of that firm was *their agent*, as alleged. Notwithstanding plaintiffs, in their supplemental petition, distinctly charge that, since this suit was filed, they have made, at the request of the defendants, certain repairs on the church edifice, which they were under no obligation to make, and which were caused by the defective plan of said building, or the carelessness of other people, over whom they had no control and for whom they are not responsible; and, notwithstanding that said building was thereby put in a condition *completely satisfactory to the defendants*, who took possession thereof and are now using same without any cause of complaint, and without pretending that there are any imperfections in the work; the defendants, without making any denial or disavowal whatever, set up a defence that the building has not been completed in a good and workmanlike manner *to the*

satisfaction of the architects, and insist upon the stipulation of the contract giving them the right to withhold fifteen per cent of the contract price of the edifice "*until the building is completed and accepted by the architects.*"

The defendants, then assuming the character of plaintiffs in re-convention, allege that under the stipulations of the contract the plaintiffs agreed and bound themselves to complete the building by the 23d of June, 1892, or to pay them the penalty of fifty dollars per day for every day they were in default in so doing after that date; and, averring that they had been in default for a period of five hundred and eighty-one days, they demand of plaintiffs the sum of twenty-nine thousand and fifty dollars on that score.

Taking a comprehensive view of defendants' conceptions and defences, they appear to us to be entirely technical.

While it is true that the defendants were under no obligation to pay the final balance due under the contract, except upon the approval and certificate of the architects, yet we are fully satisfied that one member of the firm of architects was an agent of the defendants, and, occupying that relation toward the defendants, may have unduly influenced the firm to withhold a certificate of approval of the work to which they were rightfully entitled.

This impression is fortified by the fact that the architects assigned as *their* reason for withholding a certificate, that plaintiffs had not paid up the sub-contractors—not that the building had not been finished and completed according to contract—while it is a fact, undenied by the defendants, that they had been fully authorized to pay such amounts as were ascertained to be due, and deduct same on settlement with plaintiffs.

On this state of facts we are of opinion that the plaintiffs were entitled to sue, and had a right of action against defendants, notwithstanding they had failed to procure a certificate from the architects.

The district judge evidently entertained that view, maintained the suit, and rendered judgment. Finding that the sub-contractors had not been paid in full, and were entitled to a balance on their contract, he adjudged their respective differences and gave them judgment for the balance due, and he allowed the plaintiffs the amount of their demand less this reduction.

Entertaining this view and appreciation of the controversy, the discussion is narrowed to a very restricted limit, for it is to be ob-

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served that defendants' contention mainly is, that the building had not been completed in a good and workmanlike manner, to the satisfaction of the *architects*, and their insistence is, that they have a right to withhold fifteen *per centum* of the contract price "until the building is completed and accepted by the architects."

It is also to be observed that the defendants do not, for themselves, deny the completion of the building, much less do they set out in detail or in substance any defects or faults or imperfections in the structure. They do not deny that they are in full possession and use of the edifice for the purposes for which it was erected, and in the absence of such averment and denial, we feel authorized to assume that no such fault or defect existed at date of their acceptance of the work without either protest or complaint.

It is equally significant that, notwithstanding the architects withheld certificate from the plaintiffs, on the faith of which they were entitled to receive final payment from the defendants, they do not assign as a reason for their refusal that there were any faults, defects or deficiencies in the construction of the edifice, but they put their declination to furnish the certificate on the ground that the plaintiffs did not furnish them *proper evidence* that all sums due for materials and to the sub-contractors had been paid.

On the merits, it is urged by defendants' counsel that there is testimony to the effect that there are several small amounts due for materials furnished, aggregating about one thousand six hundred and twenty-five dollars and ninety-seven cents, while on the other hand it is shown the true amount of said claims aggregate only seven hundred and twenty-one dollars and fifty cents. These claims are independent of the claim of the sub-contractors who have intervened. While it is true that some of these claims have not been registered, so as to affect the building with a lien, and those creditors have not been made parties, we think it but just and right that their claims should be protected by our decree.

Defendants also insist upon the cost of additional changes and alterations in the contract, that were made at the suggestion of the architects, amounting to one thousand four hundred and seventy-nine dollars.

It is evident that these items were properly disallowed by the judge *a quo*, as they were not set out in the defendant's answer, and they are not satisfactorily established by evidence.

The judge *a quo* rejected entirely the defendant's reconventional demand for what is termed liquidated damages, consisting of fifty dollars for every day that the defendant delayed the completion of the edifice, after the date fixed in the contract for its completion and acceptance.

The contract was made on the 28d of October, 1891, by and between Henry P. McDonald, *as agent for and on behalf of the defendants*, and the plaintiffs. It provides that the work shall be commenced at once, and completed by the 28d of June, 1892; and for *any delay of completion* it is agreed that the second party (plaintiffs) shall pay damages at the rate of fifty dollars *per day*, which may be deducted from the contract price, or recovered by suit, etc. Sec. 11.

"The second party (plaintiffs) assumes the risk of any accident or damages that may occur to *his work or material*, or to persons or property about the work pending its completion," etc. Sec. 12.

Counsel for the defendants admit that the congregation began worshipping in the church, for the first time, on the 16th of April, 1893, though the church was not finished, they say.

They claim, for the intervening time of two hundred and ninety-nine days, at fifty dollars *per day*, an aggregate sum of fourteen thousand nine hundred and fifty dollars, though their prayer is for twenty-nine thousand and fifty dollars for five hundred and eighty-one days' default.

Of the plaintiffs' defences to their reconventional demand, the defendants say, in their brief:

"Plaintiffs seek to explain the delays, and to relieve themselves from the effects thereof, by testimony going to show that the delays were, in part, due to matters not in their control. For instance, they claim that the plans had to be corrected before they could make a start; that the cement called for in the specifications stained the stone, and they could not, therefore, continue the work; that the tower of the church leaned, because of faulty construction, based on defective and inadequate plans and specifications. Evidence in support of these defences was offered, and objected to, on the ground of incompetency and irrelevancy. The objections were overruled, and bills of exception were reserved. The objections, it is submitted, should have been sustained."

We think the objection was not well taken, for it was both competent and relevant to enquire whether the "delay of completion" of

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the edifice after the date fixed for its completion was the result of any accident or damage done to the (plaintiff's) work or material.

For, we read in the contract this pertinent and controlling provision, vis.:

The party of the second part (plaintiffs) agree that they will "furnish all labor and material, and erect complete, St. Paul's Church * * * in exact accordance with the plans and specifications prepared therefor, by McDonald Bros , architects, and under their inspection and supervision," etc. Section 1 of contract.

All of the defences enumerated appear to come clearly within the contemplation of that section.

All the plaintiffs undertook to do was to furnish the labor and the material, and to do the work. The plans and specifications for the work was matter for the architects alone.

In order to put the blame on the plaintiffs the burden of proof was upon the defendant to show, by fair preponderance of proof, that the work was not performed by the plaintiffs *in accordance with the plans and specifications furnished them by the architects*; and also that the delay in the completion of the structure on time was due to the faultiness of their workmanship or material.

This burden the defendants did not discharge. From the record we find that the first delay was occasioned in November, 1891, by a necessary change which the architects had to make in the drawings and plans for the edifice, and in consequence thereof the manufacturer of the ironwork was delayed, and no progress with the work was made until the 28th of December, 1891. The foundation of the building could not be commenced until the 18th of January, 1892. The architects notified the plaintiffs to stop all work and wait for the revised plans, and they acted accordingly.

The second delay was occasioned by the cement staining the stone. This occurred in March, 1892, and lasted about one month. The work was suspended on that account, on the order of the architects.

There is no doubt of the fact that plaintiffs used the identical cement that is called for by the contract, and it is neither proved nor contended that it was any fault of the plaintiffs that the cement stained the stone. It is in proof that the cement was mixed exactly in accordance with the instructions of the architects and their superintendent.

The third delay was occasioned by the leaning of the tower, caused by faulty and defective specifications.

The record shows that the first indication of any defect in the tower is to be found in a letter which was addressed to the architects by their manager. It runs thus:

"NEW ORLEANS, May 24, 1892.

"*McDonald Bros., Architects:*

"DEAR SIRS—I notice for the first time, to-day, a crack over the front door on Camp street, the exact cause of which I have not yet been able to discover," etc.

To this letter the architects wrote the following reply, viz.:

"LOUISVILLE, KY., May 26, 1892.

"*St. Paul's Church, Charles R. Coats, Esq., No. 66 Baronne street, New Orleans, La.:*

"DEAR CHARLES— * * * Referring to the crack over Camp street entrance, I am satisfied, without receiving your report, that it is due to the slight want of settlement which will necessarily take place on the side of the tower where the load of the gable comes on it.

"Have no apprehension about it. *Keep it concealed* as to avoid attracting any attention to it, and when the proper time comes to close the gable we will simply cut it out and let it come together. If anyone remarks it explain the situation. * * *

"Yours truly,

"MCDONALD BROS."

This correspondence explains itself.

And we can not imagine what more conclusive evidence could be required of the fault of this defect in the building of the tower being that of the architects. They do not even suggest to their own subordinate that it was the fault of the plaintiffs.

This occurred, as the dates of the letters will show, on the 24th of March, 1892, prior to the date fixed in the contract for the completion of the building, the 23d of June, 1892.

The testimony substantially shows that the tower was built in conformity with the plans furnished by the architects, and that the superintendent of the architects notified plaintiff's workmen to stop work and go away on account of the threatened fall of the church tower. It shows that it was suffered to remain in that condition for

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six weeks or two months before the work was resumed, and that five or six months' time was occupied in getting the tower righted up again.

The weight of the testimony is to the effect that if the trouble and delay occasioned by the leaning of the tower had not occurred, the edifice would have been completed on time. That all the laborers and material were on the ground and in readiness at the time of the occurrence.

Without going any further into the detail, we will state our conclusion to be that the responsibility for the defective tower is upon the architect and not upon the plaintiffs, for it is evident that the leaning of the tower was occasioned by the primary defect in the plans and specifications for which the architects were responsible, and not by the faultiness of the material or workmanship for which the plaintiffs were responsible.

And in confirmation of our theory, while in no way influencing our opinion, we may say that the fact has been called to our attention that the defendants have a suit against the architects on that score, and that suit gives rise to the suggestion that in this suit they are exhausting their recourse against the plaintiffs in order to justify their demand against the architects.

Altogether our conclusion is that the judgment rendered by our learned brother of the lower court has done substantial justice and should be affirmed, saving the rights, however, of the material men to the extent of seven hundred and twenty-one dollars and fifty cents, or so much thereof as may be judicially established.

It is therefore ordered and decreed that the judgment appealed from be affirmed, with the restriction that it shall not be enforced until satisfactory provision is made for the settlement of the claims of material men, to the extent of seven hundred and twenty-one dollars and fifty-five cents, or so much thereof as may be judicially established.

No. 11,797.

FLORENCE P. WILLIAMS VS. J. E. HEWITT.

Unincorporated associations conducting the banking business are liable as commercial partners. Story on Partnership, Sec. 164; Civil Code, Art. 446.

Such associations claiming exemption from that liability as corporations must show compliance with the substantial requisites prescribed by our legislation

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48 1215

47 1076
52 182

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107 570

47 1076
114 741

47 1076
116 412
116 416
117 410

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respecting the organization of private corporations. Among these requisites are the statement in the act of organization of number of the shares held by the shareholders and publication of the act in the mode prescribed by law. Revised Statutes, Secs. 275, 279, 282; Cook on Shareholders, Chap. 13, Secs. 230, 231, 232, 233, 234 *et seq.*; 16 An. 153; 29 An. 370; 33 An. 635.

The depositor seeking to recover the amount deposited is not estopped from holding liable as commercial partners the members of such unincorporated association by the fact that they conducted the banking business in the name of a bank, appointed a president and cashier, issued certificates of deposit, and assumed to be a *de facto* bank. Cook on Shareholders, *Ibid.* and above authorities.

A PPEAL from the Ninth District Court for the Parish of DeSoto.
Fournet, J., in place of Hall, J., recused.

J. F. Pierson and C. W. Elam for Plaintiff, Appellee:

Pleas involving facts on the merits of an issue are not exceptions, but an answer. 29 An. 398; 25 An. 339; 21 An. 131.

Defendants who plead corporate exemption from personal liability for their acts, imprudence or negligence, must, to escape liability, clearly establish the corporate existence and exemption which they plead. Vrendenburg vs. Behan, 33 An. 635; 16 An. 153; 29 An. 369; 37 Cal. 354; 46 N. Y. 477; 3 N. Y. 394; 73 Ill. 197; 32 Ind. 138, 169; Parson's Principles of Partnership, Sec. 24.

Full compliance with statutory requirements is essential and a condition precedent to the creation of a banking corporation under the free banking laws of this State. Cook case, 16 An. 153; Converse case, 29 An. 370; same case, 33 An. 963; same case, 37 An. 485.

There are essential qualities of a corporation, without which it can not exist. 37 An. 488.

Associations existing without a full compliance with statutory requisites for the formation of a corporation have always been treated by this court as unincorporated, or as having no corporate existence. *Ibid.*; 3 An. 541; 33 An. 638; 15 An. 443; 16 An. 153.

An amendment to charter, not in accordance with statutory requirements, can no more be recognized than an association which had not complied with such requirements for their formation. Piper vs. Batts, 38 An. 957.

 Williams vs. Hewitt.

The rule in *Converse* case affirmed and given full effect to, as to third persons. *Livigan* case, 46 An. 1118.

A banking corporation will not exist upon an act of incorporation that does not set forth:

1. The name or place of residence of any stockholder.
2. Nor number of shares subscribed by each.
3. Nor time or manner for payment of stock subscribed.
4. Nor where certified copy has not been deposited with Auditor of Public Accounts.
5. Nor published in official journal of State.
6. Nor in any daily paper in city of New Orleans. Rev. Stat. 277, 278, 279; 16 An. 153; 15 An. 443; 29 An. 369; 37 An. 488; 33 An. 638; 38 An. 957; 46 An. 1118.

Estoppel *in pais* must rest upon:

1. Misrepresentation or concealment of *material facts*.
2. With *knowledge* of the facts.
3. To one ignorant of the *truth* of the matter.
4. With *intention* he should act upon it.
5. And he must have been *induced* to act upon it. Bigelow, Estoppel, Ed. 1876, p. 437.

Infants and married women not estopped unless conduct has been intentional and fraudulent. *Ibid.* 443.

Estoppel operates only in favor of one misled to his injury. 96 U. S. 665, 666.

Even judicial estoppel will not operate against one ignorant of the facts at the time plea is made. 33 An. 1198.

Third persons not estopped to deny corporate existence of an adversary in court. 16 An. 153; 29 An. 369; 37 An. 488; 33 An. 638; 38 An. 957; 46 An. 1118.

Burden on party pleading exemption under corporate franchise to clearly establish the corporate existence. 33 An. 635.

Commercial partnership is one for buying or selling personal property, as factors or brokers. C. C. 2825.

The relations of the partners to third persons is the legal aspect of partnership. Parsons' Prin. Part., Sec. 48.

Liability to third persons does not flow from the partner's consent to be so. *Ibid.*, Sec. 45.

Their liability results from the law which acts upon the relations of the partners. *Ibid.*, Sec. 46.

Partnership powers arise from commercial prerogatives flowing out of the business. Sec 49.

Partnerships exist as to third persons by construction of law, even without intention of the parties. 82 An. 1181; 39 An. 668; 36 An. 240.

Associations in corporate form, without charter or corporate existence, engaged in commercial business, are commercial partners and bound as such. 38 An. 640; 16 An. 153; 12 Rob. 1333 13 La. 300; 6 Rob. 127; 20 An. 569.

Trading in corporate form without a franchise is a partnership Parsons' Prin. of Part., Sec. 24.

Lee & Liverman, Alexander & Blanchard for Defendants and Appellants:

A person who contracts with an organized going corporation, acting under a charter duly executed in good faith as a corporation at its place of business, with its proper officers and in its usual form, and where the law authorizes such a corporation for such a purpose, is estopped from denying the regularity or legal validity of its corporate existence. 13 An. 845; 33 An. 732, 1444; 46 An. 1118; Bigelow on Estoppel, 464-5, 3 Ed. (1882); Cook on Stock and Stockholders, Sec. 234 and authorities therein cited, 3 Ed. (1894); Morawetz on Private Corporations, Sec. 748, 2 Ed. (1886); 94 U. S. 104, 680; 101 U. S. 392-396; Thompson on the Law of Corporation, 365-383.

As against a party who dealt with a corporation, the production of the note or contract is sufficient evidence of incorporation. Bigelow on Estop. 464, Chap. 16.

A party who has in another suit represented to the court that a bank is organized by public authentic act, passed before the proper officers, and is doing a banking business with board of directors, a president and cashier, and that its president is prohibited by law and public policy from acquiring any of the papers or assets of said bank, and has asked and obtained the judgment of the court on the rights and duties of such bank president under the law, is estopped from afterwards claiming that such bank was not a corporation, but a partnership. Bigelow on Estop. 562, 601, Chap. 24; 28 An. 121; 25 An. 65; 31 An. 100; 37 An. 101; 40 An. 186 and authorities therein cited; 46 An. 452; 5 An. 18.

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Nor can she avoid the effect of such estoppel by a mere reservation in the first petition. 18 An. 59.

A party can not sue a bank as a corporation and its stockholders individually as commercial partners in one and the same suit. And having conducted the suit against the bank as against a corporation, and having obtained a final judgment against it in this suit, from which neither plaintiff nor the bank has appealed, the plaintiff is estopped from further pursuing these defendants as a partnership. *Pochelow vs. Kemper*, 14 An. 307, 308; *Bigelow on Estop.* 601.

Argued and submitted, May 11, 1895.

Opinion handed down, May 20, 1895.

Rehearing refused, June 8, 1895.

The opinion of the court was delivered by

MILLER, J. The plaintiffs seek to hold defendants liable for an amount deposited in the Traders' Bank, under which name it is alleged the defendants conducted the banking business, and the bank itself is included as a defendant. The defendants excepted that suing the bank along with the other defendants was a misjoinder, and estopped the plaintiffs from denying the corporate capacity of the bank; that this estoppel was further supported by the fact plaintiff had recognized the corporate capacity of the bank by depositing the money and other dealings with it; and the estoppel is placed by the exceptions on the additional ground that in a previous litigation between Mrs. Williams, the plaintiff here, and Hewitt, one of the defendants, she had made averments inconsistent with her position in this case; that the defendants are liable as members of an unincorporated association. These defences of estoppel are again urged in the answer along with the general issue, and the defence that plaintiffs dealt with a corporation and can not hold the shareholders liable. The lower court overruled the exceptions on the merits, gave judgment against defendants, and they appeal.

The law recognizes a firm name and the petition sues the Traders' Bank, alleging it to be an unincorporated association and the individual members of the association averred to be commercial partners. Money in bank and other personal property of the partnership is usually held in the name of the partnership, and the law

authorizes suits against the partnership and the individual members. We think there was no misjoinder. Code of Practice, Art. 198; Story on Partnership, Secs. 102, 142.

The defendants objected to the testimony offered by plaintiff tending to show that the articles of association relied on to sustain the defence of the corporate capacity of the bank were never published as required by law. The objection was, the petition alleged no defects in the organization of the corporation. In our view, it was unnecessary to make such allegations or offer the testimony. It is, we think, clear that sued as commercial partners it was for defendants to maintain they had become a corporation, by complying with the requisites of the law. Hence, the ruling on the testimony is of no consequence.

The legislation authorizing the formation of banking associations requires the organization articles to be by notarial act, stating the number of shares into which the stock is divided; the names, residences and number of shares held by the shareholders; the time manner of payment of the shares, with other particulars; and the act must be registered in the office of the recorder of the parish; the domicile of the corporation, and the act must be published in that parish and in New Orleans, and in Baton Rouge. Revised Statutes, Sec. 279.

It is conceded that the act claimed to invest the defendants with corporate capacity contained no statement of the number of shares held by defendants, and was never published in New Orleans or Baton Rouge. Mere informalities in the act may well be disregarded, but it will not be disputed it is to be presumed that the omission in the act here, and the failure to publish it as required, are material. In our view, the fact affords no defence, and unless there is some other ground, defendants must be held as commercial partners. Cook on Shareholders, Secs. 230, 231, 232, 233, 234, *et seq.*; Revised Statutes, Sec. 282; Field vs. Cooks, 16 An. 153; Workingmen's Accommodation Bank vs. Converse, 29 An. 370; Vrendenburg vs. Behan, 33 An. 635; Story on Partnership, Sec. 164; Angell and Ames on Corporations, Secs. 41, 591.

It is claimed, in support of the estoppel pleaded, that the tendency of more recent authority is that those who constitute themselves and do business as a *de facto* corporation can not be held as individuals. If this is to be accepted, there is but limited, if any, necessity for

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our law providing for organization of private corporations, compliance with which has been generally accepted as essential to enable individuals, without incurring personal responsibility, to do the banking business. It would be enough to assume the name, appoint officers and receive deposits and pay checks. But if the argument is to be deemed to affirm that an attempted organization under the corporation law will relieve individuals from liability in conducting a *de facto* bank, the answer is, we think, that the organization proposed must conform to the substantial requisites of the law, or it will be abortive. Mr. Cook thus states the law: "The creditor may ignore the asserted corporation, and proceed against the supposed stockholders, if the prescribed method of incorporation has not been observed." He recognizes that mere informalities are inconsequential. He mentions want of publication as fatal, and we think no less can be said of the absence of any statement of the number of shares held by shareholders, the measure of whose responsibility, indicated by the number of shares they hold, is important to be known to all who risk their money on deposit in chartered banks. Cook, *Ibid.*, and our decisions cited. Revised Statutes, Sec. 282; Angell and Ames on Corporations, Secs. 41, 591. The fact then that the defendants assumed to be and did business as a *de facto* bank, even if that assumption is deemed conveyed to plaintiffs by the name of the bank and issue of the certificates, is manifestly no protection to defendants against liability in their individual capacities.

We do not understand that the testimony as to the dealings of the plaintiffs with the bank attributes to them any knowledge at the time they made the deposit of the attempted organization. The estoppel seems to rest on the deposit and the certificate issued by the institution known as the Traders' Bank. It is possible to conceive of one depositing his money in a bank with full knowledge the institution had proposed organization as a corporation under the laws, had failed, and yet was doing business. If anybody had that knowledge, in all human probability no such deposit would ever be made, certainly not, unless the depositor was satisfied of the personal responsibility of the parties engaged in the business, and relied on it, and on it alone. We can not, therefore, find the basis for any estoppel based on any knowledge on plaintiffs' part of the attempted organization or its failure, for if he had any such notice he must be

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deemed to have acted on the faith of that personal liability it is now claimed he is estopped from asserting. If there was any estoppel of this character, the plaintiffs would be in this predicament; it is conceded the bank never organized, and hence plaintiffs have none of the remedies given by our legislation to creditors of corporations. Revised Statutes, Sec. 275, *et seq.*; Act No. 150 of 1888; No. 95 of 1882. Nor have they any recourse on the individual members of the unincorporated association if their theory on estoppel prevails. The plaintiffs, when they made the deposit, acted on the ordinary faith of responsibility for that deposit. Their knowledge that the institution was not chartered came to them after the deposit. There is, in our view, no basis to infer any notice to plaintiffs of any kind on which an estoppel can be based, unless we are to hold that the externals usual to all private banks, of the name of a bank and presidents and cashiers, with the issue of certificates of deposit, estop plaintiffs from asserting the individual liability of those who receive deposits.

The courts have not frequently applied the estoppel against denying the existence of the corporation. It will be found that in such cases the estoppel has rested on conduct of the corporation which made it inequitable for it to avail of the estoppel, and it strikes us if there is any room in this case for any estoppel, it would be that arising from defendants taking plaintiff's money on deposit as bankers with no license to do that business. It would be, in our view, a palpable wrong to plaintiffs if they were not precluded from enforcing against defendants the liability announced in express terms by our statute and with equal clearness by the commercial law that unincorporated bankers shall be liable to the full extent of their engagements. Revised Statutes, Sec. 282; Story on Partnership, Sec. 164, 77; Angel and Ames on Corporations, Sec. 41, 591. Estoppels in favor of corporations have been placed on dealings with them resulting in some benefit or advantage obtained from the corporation, and very naturally, it has been held that the party holding such advantage or benefit could not dispute the resulting liability by denying the existence of the corporation when sued by it on his obligation. It is in great part the long line of cases of estoppels against or for corporations or asserted corporations all resting on some basis of conduct or of benefit obtained, or other cause forbidding as inequitable the estoppel attempted to be invoked, from

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which the defendants claim to derive support for the estoppel of conduct they plead. These cases, cited in defendant's brief, have had our attention and are covered, we think, by the comment we make. Thus in *Douglas County vs. Bolles*, 94 U. S. 104, it was held the corporate existence could not be denied by its debtors; the same principle is applied in another case cited by defendants of suits to enforce stock subscriptions. *Casey vs. Galli*, 94 U. S. 680, and there are similar types. The case of *Wallace vs. Loomis*, 97 U. S. 446, affirms that corporate capacity assumed to obtain a standing in court can not be afterward denied. Another phase of estoppel having some affinity to defendants' case, is that of a creditor selling to a corporation in progress of formation when the goods were sold, and the organization completed after, of all of which the creditor was fully advised when he sold the goods; in the suit brought by him against the individuals of the corporation it was very properly held he was estopped by the explicit communication to him, arising from the transaction itself and the correspondence, that he was dealing with an inchoate corporation, and was to rely alone on its responsibility. *Whitney vs. Wyman*, 101 U. S. 392. In these and similar cases in which any dispute of the corporate existence has been deemed precluded, we can find nothing to support defendants' contention. The plaintiffs have obtained no benefit or advantage from defendants, nor done any act or pursued any line of conduct by which defendants have been prejudiced, or at all inconsistent with plaintiffs' suit to obtain their money from those who took it on deposit. The plaintiffs put their money in defendants' bank under the usual obligation of those who received the money to return the deposit when called upon. We can find no estoppel arising out of this transaction to defeat the plaintiff.

Nor do we think the other estoppel urged on us rests on any better basis. It is that in the suit of Hewitt, one of the present defendants, against Mrs. Williams, the present plaintiff, she urged that the notes and claims on which she was sued belonged to the Traders' Bank, of which he was president. It was a fruitless attempt of a debtor to deny the plaintiffs' title to notes and claims assigned to him, which he had no interest to question. The defence failed, and because of this defence it is now urged she can not sue the defendants for her deposit. In the first place the averment by Mrs. Williams that Hewitt was president of the Traders' Bank in no man-

State ex rel. Manning vs. Judge.

ner admits it was a corporation. The principle she asserted that one could not acquire, individually, notes or claims that came into his hands, or in his fiduciary capacity, might as well be said of the president of a private bank as of a corporation. The averment admits nothing bearing on this case, and besides, a means of defence overruled in a past litigation will not, except under peculiar circumstances, preclude the facts passed on in the previous litigation from use in a future suit.

We have given the case in all its aspects careful attention, and in our view there was no defence. If we have not noticed all phases of the able discussion of the defendants, it is because the views expressed dispose of the case.

It is therefore ordered, adjudged and decreed that the judgment appealed from be affirmed with costs.

No. 11,765.

STATE OF LOUISIANA EX REL. JAMES A. MANNING VS. H. W. SHERBARD, JUSTICE OF THE PEACE OF WARD NO. 4, FOR THE PARISH OF JACKSON.

The petition of the relator, annexed record and return of the respondent, disclosing that the judicial proceedings complained of are regular in form, and apparently valid, relief by *certiorari* will be refused.

APPPLICATION for a Writ of *Certiorari*.

N. M. Smith, for relator.

C. P. Thornhill, for respondent.

Submitted on briefs, May 22, 1895.

Opinion handed down, June 3, 1895.

47	1085
47	1534
47	1085
48	790
47	1085
117	298

State ex rel Manning vs. Judge.

The opinion of the court was delivered by

WATKINS, J. Relator prays for *certiorari* directed to the respondent, commanding him to send up a certified copy of the proceedings in the cause in his court, entitled James A. Manning vs. A. E. Simonton and A. A. McLane, sheriff, to the end that their legality may be ascertained.

The substance of the complaint of relator, plaintiff in said suit, is that defendant, Simonton, had obtained judgment on an ordinary debt against Martha Davis in the respondent's court, on which execution had issued, and *inter alios* some corn had been seized, on which the relator claimed the privilege of lessor for the current year. That he filed an opposition and obtained an order of court, commanding the sheriff to hold the proceeds of the sale subject to the further order of the court, and caused citations to be made on the sheriff and the seizing creditor. At the trial exceptions to citations were tendered and sustained by the respondent, and the opposition dismissed, on the statement of the sheriff that he was a party to the suit and incapacitated to make the service on the seizing creditor. That the respondent then appointed a special constable, who made a new and additional service on the parties, and thereupon they again excepted that the special officer was incapacitated to make service, as he had not subscribed the requisite oath nor given the necessary bond. That said special officer took the oath and subscribed the necessary bond, and again the opposition was reinstated and new service of citation made, whereupon the parties defendant made the point that it came too late, because the funds had been paid over, and there remained nothing in the sheriff's hands subject to the order of the court. This exception was sustained by the respondent, and relator's opposition was dismissed.

On these proceedings relator demands relief at our hands, on the ground that they are absolutely null and void.

To the respondent's return is annexed a transcript of the proceedings in his court. They are in keeping with the statement in the petition, and appear to be perfectly regular in form.

The return shows that, prior to service being first made on the sheriff and seizing creditor, respondent invited the attention of relator's counsel to the fact that both the coroner and sheriff were parties in interest, and requested his advice as to the manner in which service should be made, and that service was made as he sug-

gested, counsel agreeing to assume the risk of such a service being good -

It further shows that, as a matter of fact, the seizing creditor and sheriff testified as witnesses at the trial of the exceptions, and they had not been served with any notice at all, and had no knowledge of the order of court requiring the sheriff to keep the proceeds of sale subject to the order of court.

It further states:

"These facts having been established to respondent's satisfaction, and believing that no valid judgment could be rendered without such service, he dismissed the action, the relator having made no effort to get service made upon the parties, and made no application for a continuance of the cause, in order to have service made. On the contrary, he contended, in his argument to the court, that a sufficient legal service had been made, and that the exception should be overruled, and that judgment should be rendered decreeing him to be paid by preference out of the proceeds of the sale of the property seized," etc.

That subsequently the relator's counsel requested the appointment of a special constable, and he made the appointment notwithstanding he entertained doubts of his authority to do so, and counsel again assumed the risk and responsibility of seeing that the appointee was properly qualified and gave bond.

That when the second exception was tried the appointee testified as a witness that he had not qualified under the aforesaid appointment, and that relator's counsel, in open court, admitted that the exception was well taken, and instructed the party to qualify.

That when the case came up for a third time proof was made that the proceeds of sale had been paid over to the seizing creditor. This fact was undenied by any one.

On this showing we feel justified in holding that the relator has no claim whatever to relief at our hands.

We entertained serious doubt of his claim to relief when granting the preliminary restraining order, and only made it as a precautionary measure, lest some wrong might have been done the relator.

Let the restraining order be set aside, and relator's demand be rejected at his cost.

State vs. Clements.

No. 11,883.

STATE OF LOUISIANA VS. THOMAS CLEMENTS.

An accused has the burden on him of establishing a plea of insanity to the satisfaction of the jury beyond a reasonable doubt. The State is not bound to affirmatively prove the sanity of the accused.

A PPEAL from the Tenth Judicial District Court for the Parish of Rapides. *Andrews, J.*

M. J. Cunningham, Attorney General, and *John C. Ryan*, District Attorney *pro tem.*, for Plaintiff, Appellee.

Robert P. Hunter for Defendant, Appellant.

Submitted on briefs, May 25, 1895.

Opinion handed down, June 3, 1895.

The opinion of the court was delivered by

WATKINS, J. The defendant having been indicted and convicted of the crime of forgery, on two counts, and sentenced to imprisonment in the penitentiary at hard labor for a term of seven years, has 'appealed—relying on two bills of exception.

The first bill relates to the following extract from the charge of the judge to the jury, viz.:

"I charge you that when the defence of insanity (is set up) in avoidance of the penalty prescribed by law, the burden of proving insanity rests upon the prisoner, and he must make out his case by proof which satisfies your mind beyond a reasonable doubt as to whether, at the time of the commission of the offence, he was sane or insane. If you have any reasonable doubt on that point, it will be your duty to convict the prisoner."

Defendant's counsel insist that the charge, as given, was erroneous and injurious, and that he is entitled to relief.

The trial judge cites and relies upon the *State vs. Coleman*, 27 An. 691, and *State vs. De Rance*, 34 An. 186, as supporting his ruling.

In the former case the court puts the proposition thus tersely, viz.:

Succession of Jackson.

"The answer to the ninth objection is, as previously stated, the State is not bound to prove the sanity of the accused. He who alleges it must prove it."

In the former the court said:

"But to have any serious weight in the eyes of the jury, such alleged unsoundness of the mind, or momentary insanity, must be shown to have been an undoubted fact, not before or after, but at the very time the unlawful act complain of was committed. It is at that particular time that it *must be established beyond a reasonable doubt* that there existed, on the part of the accused, no capacity to discern right from wrong as to the act forming the basis of the charge." (Our italics.)

These two decisions seem quite sufficient to dispose of the case, and sustain the ruling of the trial judge.

The defendant's second bill relates to the judge's refusal to grant him a new trial, predicated exclusively upon the charge of the judge, which is disposed of in the preceding bill. The judge's ruling was a matter of course.

Judgment affirmed.

No. 11,796.

SUCCESSION OF ROBERT JACKSON.

A party who performs services under a special contract can not sue for services on a *quantum meruit*.

If a servant does extra service, not strictly with the line of his duties, and receives his wages under a special contract for said service, and makes no claim for these extra services, it is too late for him to set them up against the succession of his employer.

The word "deemed" used in Art. 1641, Civil Code, simply means that no interpretation unfavorable to the creditor shall be placed upon the testament by the fact alone of the legacy to the creditor. It is a question of interpretation whether the testator intended the legacy to be in satisfaction of the debt. Some mention must be made in the testament of the debt and the testators intention must be gathered from the testament whether he intended the legacy to be in satisfaction of the debt.

A PPEAL from the Civil District Court for the Parish of Orleans.
Théard, J.

Dinkelspiel & Hart and *Edward Dinkelspiel* for John C. Boland
Plaintiff, Appellant.

Succession of Jackson.

Dart & Kernan for Defendant, Appellee.

Argued and submitted, May 23, 1895.

Opinion handed down, June 3, 1895.

The opinion of the court was delivered by

McENERY, J. The deceased, Robert Jackson, left a will in which he bequeathed to John C. Boland "five hundred dollars for faithful services to myself and late wife."

This servant, John C. Boland, instituted suit on 1st March, 1894, against the defendant succession, for three thousand eight hundred and fifty-five dollars, for services, at the rate of five dollars per day, rendered to the deceased and his wife, who died before the deceased, from November 25, 1891, to January 3, 1894. On December 3, 1894, Boland filed a suit, claiming the legacy of five hundred dollars. On the 13th of March, 1895, there was a consent or agreement that judgment should be rendered in favor of Boland for the legacy.

In the suit for wages, the counsel for Boland offered evidence to show the value of the services.

To the introduction of this testimony counsel for the executor objected, upon the ground that the legacy to plaintiff was in compensation of his wages in the way of a remunerative donation, which had been acquiesced in by the institution of the suit, and by consent to a judgment in favor of the legatee. After this objection, and with leave of the court, the counsel of the executor filed a supplemental answer in which he asked for a rejection of the demand of plaintiff, because he was estopped from making any claim for wages after having accepted the legacy. The objection to the filing of this amended answer was overruled, whereupon the attorney for plaintiff asked to withdraw the suit and the consent for a judgment in the case. This motion was denied, and judgment was rendered in favor of the legatee on the consent given by him.

From this judgment Boland appealed.

In the answer of the executor, it is stated that the plaintiff, Boland, was working under a contract for fixed wages, and that he had been paid all that was due him. If such a contract existed, and the services rendered by Boland were under it, it is clear that he can not sue on a *quantum meruit*. It is not necessary to say anything on the

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question, whether the legacy was or not a remunerative donation, or whether a remunerative donation can be made in the form of a testament.

Art. 1641, C. C., says: "A legacy made to a creditor shall not be deemed to be in compensation of the debt, nor a legacy made to a servant in compensation of his wages." If the wages had been agreed upon, the disposition in the testament could have no force in defeating the claim for wages, and it is but a just interpretation to say that the testator intended the legacy to be in addition to the stipulated wages in recognition of the services having been faithfully performed.

Hence, when the Code says that a legacy to a servant shall not be deemed to be in compensation of his wages, it has reference to fixed wages.

If the services rendered were not under contract, but open to proof of their value, they are a debt against the succession of the deceased. Some mention, therefore, must be made in the testament of the debt, and the testator's intention must be gathered from the testament, whether he intended the legacy as a compensation for the debt. The word "deemed" used in the article simply means that no interpretation unfavorable to the creditor shall be placed upon the testament by the fact alone of the legacy to the creditor, It is a question of interpretation, and whether the testator intended the legacy to be in compensation of the debt must be construed from the terms used in the testament. Code Civil annote, Fuzier-Herman, Art. 1023, notes 1 and 2.

If the legacy from the terms of the testament is in satisfaction of the debt, the legatee must either accept the legacy or renounce his claim. *Id.*, note 4.

If a creditor who, without having seen the testament by which the legacy is made to him, declares in a receipt that the legacy is made to him in compensation of his claim, he is not thereby debarred from demanding the payment of the legacy. *Id.*, note 3.

Under the facts and circumstances of this case we do not think by discontinuing the suit the plaintiff renounced the legacy, as it is not expressly renounced in the motion. Nor do we think the consent that a judgment should be rendered in his behalf, should estop the plaintiff from claiming his wages under a *quantum meruit*, unless

 State vs. Johnson.

the testament shows that it was the intention of the testator to satisfy the debt by the legacy.

We conclude that, if there was a contract for stipulated wages, and the plaintiff had been paid all due him, he can not recover under a *quantum meruit*. If, in the course of his employment, he performed services not strictly within the lines of his duties, and accepted the wages at different times, and made no claim for extra compensation, it is too late after the death of the employer to set up such a claim against his succession.

We see no expression in the will of the testator's intention that the legacy should be in satisfaction of any debt due by him to the plaintiff. But if the proof shows, on a retrial hereof, that the plaintiff had a contract for wages, and received the same without making a demand for services which possibly were beyond the strict line of his duties, it is reasonable to suppose that the testator, remembering these for which no compensation had been asked, and which could not be recovered against his succession, thought proper to give to Boland the sum of five hundred dollars for his faithful services.

It is therefore ordered, adjudged and decreed that the judgment herein be annulled, avoided and reversed.

It is now ordered that the case be remanded to the lower court, to be proceeded with in due course of law and the views herein expressed.

 No. 11,776.

STATE OF LOUISIANA VS. EDWARD JOHNSON.

Act 89 of 1894 does not require the jury commission to meet at the court house, or at the parish site. The act authorizes the clerk to designate the place of meeting, and for good and sufficient reasons, he can call the commission together at any convenient point in the parish. If the deputy clerk participates in the drawing of the jury immediately under the control and supervision of the jury commission, and does acts by their direction, these acts are those of the commission, and if irregular, must be imputed to the commission. The accused must, therefore, show that some fraud has been practiced that does him an injury in the drawing and summoning of the jury in order to avail himself of such irregularities.

A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

47	1092
47	1095
47	1092
50	152

State vs. Johnson.

Milton J. Cunningham, Attorney General, and *Robert F. Broussard*, District Attorney, for Plaintiff, Appellee.

L. O. Hacker, A. & Charles Fontelieu for Defendant, Appellant.

Submitted on briefs, April 12, 1895.

Opinion handed down, April 22, 1895.

Rehearing refused, June 6, 1895.

The opinion of the court was delivered by

McENERY, J. The accused was indicted for perjury, tried and convicted. He appealed.

He complains that the grand jury who found the indictment was illegally drawn and the grand jurors were illegally summoned, and that the indictment is fatally defective, as it does not show on its face that the alleged false statement was material to the issue. The illegality of the drawing of the grand jury is based on the fact that the jury commission met elsewhere than at the parish site, and that the deputy clerk participated in the drawing of the jury.

Section 4 of Act 89 of 1894 says the jury commission shall meet at some place to be designated by the clerk of the District Court.

It does not require the jury commission to meet at the court house, or in the town or city which is the parish site. In this case the clerk of court was sick, and he designated the town of Loreauville, where he could be present, as the place where the jury commission should meet. It would appear that the law was so framed as to meet an emergency such as is here presented.

The only evidence in the record as to the participation of the deputy clerk in the drawing and selecting of the jury is his statement: "I assisted at the drawing of the venire for the present term of court."

In *State vs. McCarthy*, 44 An. 324, we noted the distinction between the acts of one who intruded himself upon the commission, and did acts which were not those of the commission, and one who was present with full knowledge of the commission, and acted directly under the supervision and control of its members.

State vs. Shaw.

We are to presume that the members of the jury commission, in the absence of testimony to the contrary, performed the duties imposed upon them by law. Therefore, we conclude that the deputy clerk acted under the immediate control and direction of the commission, and performed such acts only as it directed.

The *proces verbal* shows that Numa Broussard, the clerk of court and *ex-officio* member of the commission, with the other four members of the commission, actually drew the jury. We are not informed what particular act the deputy clerk did, but his presence being authorized by the commission, and his acts directed by them, they were the acts of the jury commission, and if irregular, must be treated as irregularities of the commission. *Id.*, 28.

There is no evidence that any fraud has been practiced upon the accused, or any great wrong inflicted upon him in the selection and summoning of the jury that would work irreparable injury. Unless the irregularity in the drawing and the summoning of the jury produce such a result, the accused can not complain. Sec. 9, Act 89 of 1894; *State vs. Taylor*, 44 An. 783; *State vs. Green*, 43 An. 402; *State vs. Simmons*, 43 An. 991; *State vs. McCarthy*, 44 An. 824.

The bill reserved to the alleged defect in the indictment is not pressed in the brief of counsel for accused. The defect does not exist as the indictment specially charges the materiality of the testimony to the issue presented in the case in which the accused was a witness.

Judgment affirmed.

No. 11,777.

STATE OF LOUISIANA VS. LOTT SHAW.

APPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

Milton J. Cunningham, Attorney General, Robert F. Broussard, District Attorney, for Plaintiff, Appellee.

A. & Charles Fontelieu for Defendant, Appellant.

State vs. Olympic Club.

Submitted on briefs, April 13, 1895.

Opinion handed down, April 22, 1895.

Rehearing refused, June 6, 1895.

The accused was indicted for larceny, tried, convicted and sentenced to the penitentiary. He appealed.

The issues presented in this case are the same as those in the case of State vs. Edward Johnson, just decided, except as to the alleged defect in the indictment in the latter.

For the reasons stated in the case of State vs. Johnson (*ante*, p. 1092) the judgment appealed from is affirmed.

The opinion of the court was delivered by McENERY, J.

No. 11,788.

THE STATE OF LOUISIANA VS. THE OLYMPIC CLUB.

47 1085
52 980

The Act No. 25 of 1890 denounces what is commonly called a "prize fight." It provides a punishment for its violation. Prize fights may be with the *hands uncovered*, or *covered with gloves* of different weight; they are preceded by elaborate preparations and training; a purse or a prize is given to the successful fighter in the contest; the statute is designed to meet both descriptions of the prize fight.

The proviso in Act 25 of 1890, which says the act shall not apply to glove contests within the rooms of regularly chartered athletic clubs, is irrelevant to the body of the statute, and is meaningless, and is therefore rejected as in no way being a part of the act.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor. J.

M. J. Cunningham, Attorney General, (E. Howard McCaleb, Jr., Benjamin Rice Forman and Charles Forman of Counsel) for Plaintiff, Appellant.

Henry P. Dart, Charles H. Luzenberg and Frank Zengel for Defendants, Appellees.

State vs. Olympic Club.

Argued and submitted, April 27, 1895.

Opinion handed down, May 6, 1895.

Opinion refusing application for rehearing, June 8, 1895.

The opinion of the court was delivered by

MCENERY, J. The case is before us on a second appeal. The case was remanded for the reason that inadmissible testimony had been received on the first trial. *State vs. Olympic Club*, 46 An. 935. The object of remanding the case was for a re-trial, excluding the illegal testimony, so as to determine whether or not the injunction prayed for should be granted, restraining the defendant from giving exhibitions of prize fights, although called glove contests. We refer to the original opinion in the case for the facts, excluding the statements of experts.

The exhibitions complained of are glove contests; in fact, prize contests with gloves.

The whole question depends upon the construction of Act No. 25 of 1890, which reads as follows:

"SECTION 1. * * * That any person who shall send, or cause to be sent, publish or otherwise make known, a challenge to fight what is commonly called a prize fight, or who shall accept any such challenge, or who shall engage in such fight, or go into training preparatory to such fight, or act as trainer for any such, contemplating a participation in such fight, and any person who shall act as aider or abettor, backer, umpire, second, surgeon or assistant at such fight or in preparation for such fight, shall, upon conviction thereof, be deemed guilty of a misdemeanor and be punished by imprisonment in the parish jail for not more than six months, and be fined not more than five hundred (\$500) dollars.

"SEC. 2. * * * That any person who shall agree in this State to fight out of this State, or shall train in this State to fight out of this State, or who shall go or attempt to go out of this State to fight in any other State, place or territory, or, being in this State, shall in any way or manner aid, abet or assist to fight or attempt to fight out of this State what is commonly called a prize fight, shall be deemed guilty of a misdemeanor, and be punished by imprisonment in the parish jail for not more than six months, and be fined not more than five hundred (\$500) dollars.

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"Provided, this act shall not apply to exhibitions and glove contests between human beings which may take place within the rooms of regularly chartered athletic clubs."

Prize fights may be with the hands uncovered, or covered with gloves of different weight.

Both kinds of fights are commonly known as prize fights. They are preceded by elaborate preparations and long and painful training. A purse or prize is given to the successful fighter in both contests. The two classes have essential features alike, the only difference being one is conducted and fought without gloves.

The statute intends to reach both descriptions of the prize fight, or as it expresses it, commonly "known as prize fights." Such contests, as the testimony shows, which are permitted in defendants' arena, are known everywhere as prize fights. The arena is specially designed for these prize fights, with ring and ropes and a seating capacity for thousands. The proviso says the act shall not apply to "glove contests within the rooms of regularly chartered athletic clubs."

These clubs, defined and designated in the proviso, and the glove contests permitted therein, are for recreation, exercise and instruction in all athletic sports, including boxing, fencing, etc. These contests and exhibitions are not for the special purpose of introducing and exhibiting for a prize trained and professional prize-fighters, nor are they for the purpose of making money from such exhibitions or contests by charging a fee for witnessing the same. The glove contests permitted in defendant's club are advertised extensively and are generally known as prize fights. The fighters are under contract with each other, with the club, and under obligations to the spectators and betters to fight to a finish, that is usually until there is what is called a "knock out."

There can be no reasonable objection to boxing as ordinarily understood. It is a manly, healthful and vigorous training, and encouraged in some of our most respectable institutions.

An interference with it by legislative power would be a great stretch of authority, bordering upon an infringement of personal liberty. And even boxing without gloves for a display of skill, and for pastime, when there is no breach of the peace and no intentional injury to the person, can not be considered as embraced within the statute. But in a prize contest for a purse, with or without gloves,

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there is, despite the customary shaking of hands and the preliminary courtesies between the combatants, an intention to do an injury, and to break the public peace. The contest is directly within the spirit, if not the exact definition of an assault. In such a contest there can not be an absence of intention to do an injury, for the purpose of the contest is to subdue an opponent by knocking him senseless or so injure him that he can not, within a given time, continue the fight.

Glove contests in athletic clubs or elsewhere, such as we have described, have no semblance to prize fights, with or without gloves. To hold that such glove contests as are permitted in the arena of the defendant club are ordinary contests for scientific boxing would be as absurd as to say that fencing with pointed foils, for the pricking of blood, would be a fencing bout to decide superior points in sword exercise.

The proviso, therefore, is without meaning or significance, as it is in no way related to the enacting clause, and is totally irrelevant thereto.

It has been held that where the proviso is irrelevant, it will be rejected. Sutherland on Statutory Construction, Par. 223.

It was probable, through unnecessary caution, that the proviso found its way into the statute. Usually the legislative intention is expressed in the proviso, and we look to it for an explanation of the enacting clause.

We do not presume that the Legislature intended to defeat the enacting clause by the proviso, but to modify or explain it, or to except something that otherwise would fall with it. The statute intended to suppress prize fighting. Fighting in the arena of the club, as described in the record, is prize fighting, and no other description can be given to it. It is preceded by the training, the challenge, the attendance of seconds, umpires, and of surgeons, each of which is denounced by the statute, and the fight is followed by all the attendant circumstances of a contest with naked hands.

We conclude that the glove contests in athletic clubs or elsewhere, when the object is only for a display of the art of boxing, as generally understood and practiced, without the prerequisites of challenge and training and the attendant circumstances of a prize fight, are not what is commonly known as prize fights, and, therefore, the proviso has no relation to or connection with the offence denounced by the statute.

It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided, annulled and reversed, and it is now ordered that the injunction prayed for be granted.

DISSENTING OPINION.

WATKINS, J. I adhere to the views expressed in our original opinion and decree. State vs. Olympic Club, 46 An. 935.

In my view, the present opinion substitutes the will of this court for the will of the Legislature. On the theory now presented, the introduction of any evidence was meaningless, and remanding the case an expensive and idle ceremony.

ON REHEARING.

MCENERY J. In this case an application is made that the decree be "simplified so as to make it clear that it applies solely to glove contests, and does not affect the charter, liquidation or other management of petitioner."

The first decree, 46 An. 955, left the club in possession of its charter and franchise, free from the demand for its liquidation or an interference with its management. The case was remanded solely for the purpose of retrial as to the character of the glove contests permitted by the defendant club.

We will, to settle all doubts, amend our decree, in accordance with the request of the defendant's counsel.

It is therefore ordered that the decree heretofore rendered in this case be amended so that the injunction be perpetuated only as to the character of the glove contests described in the opinion. No costs to follow this amendment.

No. 11,836.

STATE OF LOUISIANA VS. WILLIS AND JIM TOLLIVER.

A letter is not admissible in evidence against a party by whom it purports to have been written unless proof is first made that he wrote the letter, either by positive proof or by proof of hand writing.
The fact alone that such a letter bears the postmark of an office at which the party sometimes received his mail does not make it admissible.
A verdict by which the jury declare that they find the accused guilty, has reference exclusively to the party or parties on trial, and is sufficiently certain to identify the accused, against whom the verdict is directed.

State vs. Tolliver.

A PPEAL from the Tenth Judicial District Court for the Parish of Rapides. *Andrews, J.*

M. J. Cunningham, Attorney General, *John C. Ryan*, District Attorney *pro tem.*, for Plaintiff, Appellee.

J. F. Ariail, for Defendants, Appellants, cites: 45 An. 448; Prof-fat on jury trial, 448.

Submitted on briefs, May 25, 1895.

Opinion handed down, June 3, 1895.

The opinion of the court was delivered by

MCENERY, J. Willis and Jim Tolliver were indicted for wilfully and maliciously shooting J. J. Murphy.

Willis Tolliver alone was tried and convicted, the verdict returned being, "We, the jury, find the accused guilty as charged."

Complaint is made to this verdict that it is vague and uncertain, and that it should have named Willis Tolliver as the accused against whom it was directed.

Willis Tolliver was the only one on trial, and there could be no possible mistake as to whom the verdict referred. It was, therefore, sufficiently definite and certain. *State vs. Chambers*, 45 An. 36.

A letter purporting to have been written and mailed to one Webb by the prosecuting witness was offered in evidence to impeach the testimony of the witness, Murphy. It was rejected, and to the ruling of the trial judge a bill was reserved.

From the statement of the trial judge it appears that the prosecuting witness denied having written the letter, and that he had authorized no one to write it for him, and that he knew nothing of it.

Webb, to whom the letter was addressed, said he found the letter at his house, and did not know who carried or delivered it there.

The fact that the prosecuting witness had written and forwarded the letter, or had authorized it to be written and forwarded, was not proven, and therefore the ruling of the trial judge was correct.

The postmark on the letter and the fact that the prosecutor sometimes received letters and mailed them at the place where the letter

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was posted is not sufficient to fasten the authorship of the letter on him.

Judgment affirmed.

No. 11,688.

OVIDE DUREL vs. PERSEVERENCE FIRE COMPANY.

The charge of malice and conspiracy, brought by the plaintiff against the defendant, is not sustained by the proof.

In proceeding before an association against a member for expulsion, he is entitled to a notice of the charges and specifications.

But generally the member waives objections by appearing and examining witnesses, and taking part in defending himself against the accusation, without raising any objection regarding the irregularity of the proceeding.

The action is for damages caused by the expulsion, and the charges upon which he was expelled.

In a prior suit he was reinstated as a member of the company from which he was expelled.

The expulsion was annulled.

The error of the defendant company, acting at the time in good faith, upon a state of facts different from that afterwards developed on a trial before the District Court, is not ground for damages.

The charges against plaintiff were sufficient, upon being proven, to warrant the expulsion.

The plaintiff, upon becoming a member, had agreed upon the manner of the proceeding in case an accusation was lodged against him.

The defendant company having jurisdiction of the charge, and being under its charter and by-laws the arbitrator between the plaintiff and his accusers, the error, being one of judgment of the members, is not actionable for damages.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Bernard McCloskey for Plaintiff, Appellant:

Where the offence is of an indictable nature, the corporation can not expel, unless there has been a previous conviction before a jury. *Leech vs. Harris*, 2 Brewst. Pa. 571; *Com. vs. St. Patrick's Society*, 2 Bun. Pa. 448; *Society for Visitation of Sick vs. Meyer*, 52 Pa. St. 125.

The right claimed by the corporation should not be against public policy. *People vs. Medical Society*, 24 Bart. N. Y. 570; *People vs. New York Ben. Society*, 3 Hun. N. Y.; *Am. and Eng. Ency. Law*, Vol. 1, p. 560; Vol. 5, Disfranchisement.

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It is against public policy to vest in a corporation organized "to extinguish fires in the city of New Orleans, and to aid and help the incorporators and other future co-laborers in works of mutual benevolence and charity," the power to try a member for unnatural crime.

It is felony, assault and indecent exposure—the crime charged. Sir James Stephens' Criminal Law Digest, 103; Witthans & Becker, Medical Jurisprudence, Forensic Medicine and Toxicology, Vol. 2, pp. 508 and 509.

Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. Beach on Private Corporation, Vol. 2, pp. 728, 730, 747; 98 North Carolina, 84.

Corporations are liable for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted power. First National Bank vs. Graham, 100 U. S. 699; Philadelphia W. R. R. Co. vs. Quigly, 21 Howard, 209.

A corporation may sanction the publication of a libel or slander. Townsend on Slander, Sec. 265; 27 An. 867; Philadelphia W. R. R. Co. vs. Quigly, 21 Howard, 201.

The court will not credit the evidence of infamous persons—that is, persons who, whatever may be their professed belief, have been guilty of those crimes which men generally are not found to commit, unless so depraved as to be unworthy of credit for truth, such a person is morally too corrupt to be permitted to testify. Greenleaf on Evidence, Vol. 1, p. 465, Ed. 1885.

While, ordinarily, there is a presumption on the part of the fellow-members of a society that there is fairness in proceedings for expulsion of another; yet there are to be no presumptions in case of forfeiture of property or other important rights. The law is opposed to sharp, summary proceedings involving forfeiture. Bacon Benefit Societies, Vol. 1, p. 187, Sec. 110, Ed. 1894.

Bernard Titcher for Defendant and Appellee:

In the case of mutual aid and benevolent associations and other corporations of like character, where the constitution or by-laws provide for the expulsion of members for the commission of certain offences, upon trial by one of its committees, such com-

mittee and the association are judicial bodies, and their conclusions will be protected. Cooley on Torts, pp. 472 and 473.

If the act charged is one the commission of which the charter authorizes the company to punish by expulsion, and the company making the charges actually finds the member guilty of the offences charged, the courts will not review the action of the company by inquiring into the merits of the controversy. Bacon on Benefit Societies, Sec. 106; Black and White Smith Society vs. Van Duke, 2 Whart. 309; 8 Watts Sergt. 247; 80 Ill. 134; 8 N. W. 760; 38 Ga. 608.

If the act was such that the company had power to expel, its action will not be reviewed, and it is no objection that the court might upon the same evidence have reached a different conclusion.

Where the rules of an association provide for a notice of a certain kind of charges before a member may be expelled, a defect in the notice may be waived, and it is immaterial whether the notice is given in the required terms, if the accused appeared and went to trial without objection. Any objection he might have urged was thereby waived. Bacon on Benefit Societies, Sec. 109, p. 119, and Sec. 109, p. 138.

Where a member of such an association prefers charges against a fellow member, such charges are not a corporate act of the association, but the individual act of a member, and the charge is privileged, and the member preferring the charge will not be liable therefor, unless it is affirmatively shown that the charge was untrue and that it was made in malice. Cooley on Torts, 2 Ed., p. 252.

Such witnesses are conditionally privileged and are fully protected, unless the information has been given to gratify malice or ill-will. *Ibid.*

The authority to expel is especially conferred upon the defendant corporation by its charter and by-laws. Constitution of the Company, Art. II, Sec. 2, Art. VII, Sec. 1; By-laws, Arts. X and XI.

But even in the absence of express provisions, the right inheres in every organization to enforce rules necessary for its very existence, and to expel members whose conduct threatens its welfare and life. *Burke vs. Grand Lodge*, 44 Mich. 208; 33 N. W. 13; *Robinson vs. Yates City Lodge*, 86 Ill. 598.

Durel vs. Fire Co.

Argued and submitted, May 10, 1895.

Opinion handed down, June 3, 1895.

The opinion of the court was delivered by

BREAUX, J. The plaintiff is a member of the defendant fire company. He sues for ten thousand dollar damages. A charge of conduct unbecoming a member was brought against him. The notice from the company reads:

"From information received I make the following charge against Mr. O. Durel as conduct unbecoming a member of the company, as per Art. 10 of the constitution, by-laws of this company."

This notice was signed by one of the officers of the company, as required, and seven members.

On the day the notice was served the matter was taken up by the grievance committee in the presence of the plaintiff. Despite his opposition to a postponement, the committee adjourned its investigation to a subsequent date. At the second meeting the evidence was heard and the plaintiff was present. The committee, after its investigation, reported to the company and submitted the evidence taken.

It was read to the company, in plaintiff's presence, at one of its meetings. After hearing, a motion of expulsion was unanimously adopted by the members of the company.

Plaintiff brought suit, which suit was allotted to Division "A" of the District Court. He assailed the regularity of the proceedings, and alleged that the company had no authority to expel him; he prayed to be reinstated, and for damages.

There was judgment pronounced in his favor, as prayed for, except that his demand for damages was dismissed as in case of non-suit. From this judgment no appeal was taken.

Subsequently, he brought a second suit for the damages for which he had a non-suit.

The second suit was allotted to Division C of the District Court, and in his petition he alleged that the charge upon which he was expelled was false and malicious.

That the testimony introduced to sustain the charges before the company, and upon which the company acted in expelling him, was not worthy of belief.

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In this case the District Court decided that he was not entitled to damages against the defendant.

From the judgment of the court he prosecutes this appeal.

It is settled by the first judgment that the plaintiff was expelled without the observance of the required formalities. No decision can be rendered affecting the validity of the first judgment. It is a finality.

Although it was decided that he was expelled informally, the facts connected with the hearing may be considered, in order to determine whether the defendant company was actuated by malice or acted in good faith.

The notice to appear and defend himself before the company did not state the time and place of the offence, and no reference is made to the offence in the charge and in the notice, save in general terms that he was guilty of conduct unbecoming a member.

RELATIVE TO THE MALICE CHARGED.

It happens frequently that in originating steps to investigate accusations, men are averse to write down the charge as they should be written, and to give notice covering all needful particulars of the accusation. It was an error here, but it does not follow as a conclusion that the defendant intended to perpetrate an injustice.

It is true that the trial was not conducted with regularity and in accordance with the charter and the by-laws. But the objections urged by the plaintiff do not suggest that the action was tyrannical and arbitrary, although it was erroneous.

The record discloses that plaintiff's character was good; that friends of his in the company offered to represent him in conducting his defence, an offer which he declined.

He was present at the trial, and did not, with any vigor at all, attempt to impeach the testimony of the two witnesses who testified against him.

Subsequently it was proved on the trial of the case in the District Court that these witnesses were disreputable and unworthy of belief.

The fact remains that these witnesses were not impeached at the trial before the company, and that the company, among whose members, prior to the accusation, the plaintiff had many friends, unanimously voted for his expulsion.

Durel vs. Fire Co.

ANOTHER FEATURE OF THE CASE THAT REBUTS THE MALICE CHARGED.

He, the plaintiff, remained woefully silent during the trial, when he should have objected and protested with all the determination at his command. His denial, it seems, was not stamped with that firmness which inspires confidence.

Having failed, by his conduct, to properly defend himself, and having neglected to introduce impeaching testimony, he can not recover damages from the defendant company. It was the duty of the company to investigate the accusation over which it unquestionably had jurisdiction. The plaintiff can not be heard to complain of a condition to which he has contributed by the weakness of his defence.

RELATIVE TO THE DAMAGES CLAIMED.

Having disposed of the question arising from the informalities alleged, and having determined that there was no intentional wrong in proceeding as the company proceeded in their investigation, *i. e.*, in disregarding the forms prescribed, this brings us to the question of the company's responsibility *vel non*, in damages for the expulsion.

We are decidedly of the opinion that the plaintiff has no right of action for damages. While, it is true as made to appear to the court by the testimony offered, in the first case, that the formalities were not complied with, there is no evidence of want of good faith on the part of the defendant. The error was an error of judgment. It was not manifest at the hearing before the company that a vote of expulsion was not correct.

In the case before the court, in which the plaintiff recovered a judgment, with the aid of the rules which apply to actions at law, witnesses that had not been previously impeached were impeached, and the court became convinced that the plaintiff should be reinstated. The plaintiff appeared in his own defence before the company.

Apparently by chance, two witnesses came from opposite directions, unknown to each other, and testified against the plaintiff. There was no correspondence between the one and the other. Even in the District Court the testimony is that of strangers one to the other, and the only correspondence is that each witness has a bad

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character for truth and veracity, a fact not shown before the company.

Able counsel represented the plaintiff before the District Court, and brought out facts that had not been previously considered.

Even if the company had acted upon the same state of facts, unless it was shown that there was malice and conspiracy on the part of the members to injure the defendant (plaintiff here), he would have no right to damages.

The proof does not sustain either of the charges of malice or conspiracy of the corporation. In the second trial, which resulted in the judgment from which the plaintiff appeals, it was made evident that the plaintiff was fully informed when heard before the company of the accusation brought against him, and was given full opportunity to face his accusers.

The plaintiff had agreed when he became a member of the organization to respond to charges brought in a particular manner, and that the company would pass upon the accusation. It was a tribunal of his own selection. The expulsion was in the nature of an award by a tribunal selected by the parties.

The error committed in good faith is not one for which the company can be held in damages. It (the expulsion) was not a capricious and arbitrary exercise of power. If the charge had been true it would have been within the scope of defendant's power. The error in not having discovered the truth at the trial is not actionable for damages. We regard it as obvious that appellant has failed to disclose a right which entitles him to damages.

We are of opinion that there is no error in the judgment, and the decree is affirmed at appellant's costs.

No. 11,723.

HENRY BOLIVAR THOMPSON VS. YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

47 1107
50 304

The plaintiff held an annual free pass over defendant's road.

He was on a trip by invitation in the officer's car and was not called upon to pay or show his ticket.

The railroad company gave him the transportation in that car; he was lawfully in the car and for any injury done to him by negligence; the owners are liable in damages.

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The bell rope which caused the injury was pulled negligently and violently. The passenger who at one time saw the rope and moved away from it, is not guilty of contributory negligence from the fact that immediately after he did not, a second time, move away from it, being engaged in examining a profile sketch of the levees he held in his hands, and unmindful of the bell rope. The rope was not where it should have been. In pulling it taut, care should have been taken not to pull it violently and injure a passenger.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Joseph Brewer and Thomas M. Gill for Plaintiff, Appellee:

A railway is liable to persons whom it accepts for transportation over its line, and from whom it demands no fare, to the same extent that it is liable to passengers who pay fare. Thus, in *P. & R. R. R. vs. Derby*, 14 Howard, 468, the plaintiff, the president of another line, and a shareholder of the corporation defendant, having been injured while being carried over the defendant's line at the invitation of its president, judgment upon a verdict for the plaintiff was affirmed in error, *Grier, J.*, saying the duty of the defendant to carry carefully "does not result alone from the consideration paid for the service. It is imposed by the law, even where the service is gratuitous. 16 How. 469; *Wood's Railway Law*, Vol. 2, pp. 1040, 1041; *Patterson on Railway Accident Law*, p. 207, Sec. 218; *Buswell on Personal Injuries*, pp. 167, 168, Sec. 115; *Milton vs. Middlesex R. R. Co.*, 107 Mass. 108; *Flint & Pere Marquette R. R. vs. Weir*, 37 Michigan, 111, 114, 115; *Austin vs. Great Western Railway*, L. R. Q. B. 444, 545; *Head vs. Georgia Pacific Railway*, 79 Ga. 358.

Where carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest care and diligence. And whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence, in such cases, may well deserve the epithet of "gross." *Philadelphia R. R. Co. vs. Derby*, 14 Howard, 468; 16 How. (U. S.) 469.

Gratuitous passengers are entitled to safe carriage, and can recover damages for injuries sustained by the negligence of those operating the train of a railway. *Wood on Railway Law*, 1040, 1041;

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Patterson on Railway Acc. Law, p. 207, Sec. 213; *Ibid.*, p. 209, Sec. 215; *Ibid.*, p. 212, Secs. 218, 505; Buswell on Personal Injuries, 167, 168; Am. and Eng. Encyclopædia of Law, Vol. 2, p. 744, Secs. 9, 10; Hutchinson on Carriers, Secs. 500, 563, 564, 590; Austin vs. Great Western Ry. Co., 2 Q. B. Cases, 442; Jacobus vs. St. Paul & Chicago Ry. Co., 20 Minnesota, 125; Buffalo Ry. Co. vs. O'Hara, 9 Am. and Eng. Ry. Cases, (Pa.) 317 (1882); Railway Co. vs. Stevens, 95 U. S. 655; Ohio & Miss. Ry. Co. vs. Nickless, 71 Indiana, 271; Godin vs. St. Paul & Duluth Ry. Co., 30 Minnesota, 217 (1883); Lemon vs. Chausler, 68 Mo. 340; Ohio & Miss. Ry. Co. vs. Selby, 47 Indiana, 471; Waterbury vs. New York Central Ry. Co., 17 Federal Reporter, 671; Grand Trunk Ry. Co. vs. Vogel, (Can.) 27, 18; Gulf, etc., Ry. Co. vs. McGowan, 65 Texas, 640; 5 Otto, U. S. 655-660; 84 U. S. 627; Kimball vs. Boston, etc., Ry. Co., 13 Vermont, 55; Wilton vs. Middlesex Ry. Co. 107 Mass. 108; Head vs. Ga. Pacific Ry. Co., 79 Ga. 358; Nolton vs. Western Ry. Co., 15 N. Y. 444; Old Colony & Fall River R. R. Co., 8 Allen, 18; Littlejohn vs. Fitchburg Ry. Co., 148 Mass. 478; Rose vs. Railway Co., 89 Iowa, 246; Railway Co. vs. Hopkins, 41 Ala. 486.

In dealing with matters of litigation growing out of railway law, in connection with railway accidents, the Supreme Court of Louisiana will endeavor to place its rulings in line and harmony with the adjudications of the Supreme Court of the United States, and of the courts of last resort of the States of the American Union, in all cases in which they do not conflict with the special and exceptional system of laws prevailing in Louisiana." Henry E. Williams vs. Pullman Palace Car Company *et als.*, 40 An. 417.

"Contributory negligence is a defence which confesses and avoids the plaintiff's case, and must be made out by showing affirmatively, not only that the plaintiff was guilty of negligence, but that such negligence co-operated with the negligence of the defendant to produce the injury." Kentucky Ry. Co. vs. Thomas, 79 Ky. 160; Am. and Eng. R. R. Cases, 81.

"Mere negligence or want of ordinary care or caution will not disentitle the plaintiff to recover, unless it be such that but for that negligence, or want of ordinary care and caution, the misfortune could not have happened." Tuff vs. Warman, 5 O. B. N.

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S. 573, 585; Washington vs. B. & O. Ry. Co., 17 West Va. 190; 10 Am. and Eng. R. R. Cases, 749, 755; Am. and Eng. Ency. of Law, Vol. 4, p. 18; Thompson on Negligence, 1148 F. 3; Beach on Contributory Negligence, 19; Railroad Company vs. Jones, 95 U. S. 430; Woods vs. Jones, 34 An. 1086; Woods Railway Law, 1225; Pierce Railway Law. 326; Patterson's Ry. Acc. Law, 45.

Farrar, Leake & Lemle for Defendant and Appellant:

The necessary elements in contributory negligence are want of ordinary care on the part of plaintiff, and a proximate connection between that and defendant's negligence. Beach on Contributory Negligence, Sec. 7; Little vs. Hackett, 116 U. S.; R. R. Co. vs. Haspell, 23 Penn. St. 147.

The well established doctrine in England, in Canada and in New York, is that the stipulation in a so-called free pass, exempting the carrier from the negligence of his servants, is an absolute bar to recovery, whether the pass be a so-called "drover's pass" or not. Alexander vs. R. R., 33 U. C. (Q. B.) 474; Peck vs. R. R., 10 H. L. Cases, 473; Haigh vs. Packet Co., 52 L. J. (Q. B.) 640; McCawley vs. Furness Railway, L. R. (Q. B.) 57; Hall vs. N. Eastern Railway, *Ibid.* 437; Duff vs. Great Northern Railway Co., L. R. (Ireland), 4 Com. Law, 178; Gallin vs. Railway, L. R. 10 (Q. B.) 212.

The weight of authority in the courts of the United States, and of most of the States probably, is that drovers' passes and such like passes, given for valuable consideration, make the carrier a carrier for hire. R. R. Co. vs. Lockwood, 17 Wall. 357; Railway Co. vs. Stevens, 95 U. S. 655; Railway Co. vs. Rose, 39 Iowa, 246.

The best considered cases and the vast weight of authority are in favor of the binding effect of the stipulation in a free pass in the hands of a gratuitous passenger. Higgins vs. R. R. Co., 28 An. 133; Quimby vs. R. R. Co., 150 Mass. 365; Muldoon vs. Railway, 7 Wash. 528; Rogers vs. Kennebec Steamboat Co., 29 Atl. Rep. 1069.

Argued and submitted, March 15, 1895.

Opinion handed down, June 3, 1895.

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The opinion of the court was delivered by

BREAUX, J. The plaintiff claims damages for personal injuries sustained while on a special or private car by invitation of the general agent of the defendant.

He was struck in the right eye by the bell cord of the train. It, the contact with the bell cord, destroyed and tore away portion of the corner of his right eye, and caused secondary iritis, with partial occlusion of the pupil.

Plaintiff further avers that the injury is permanent, and renders it impossible for him to have accurate vision with the impaired eye.

The defendant denies all liability, and denies all negligence charged, and alleges that the plaintiff did not pay any fare or passage money on defendant's train on the day of the accident, and further alleges that the special car on which the plaintiff was, on the occasion in question, was not the property of the defendant company, but it was a car borrowed from the superintendent of the Illinois Central Railroad Company by the Pontchartrain Levee Board, for the purpose of inspecting levees between New Orleans and Baton Rouge; that it was, to the knowledge of the defendant, that it was intended to be used only by railway officers.

The defendant further answers that if plaintiff's eye was injured by contact with the bell cord, it was directly the result of plaintiff's negligence.

The defendant also invoked the condition upon which a free pass was issued to plaintiff; that it was to be held harmless against accidents.

The evidence shows that plaintiff, who is a civil engineer, and a member of the Board of State Engineers, and in that capacity an advisor of the Pontchartrain Levee Board, was requested by the president of that board, who is also general agent of the defendant company, to accompany the president and other members of that board to examine the line of levees in that district in order that preparation might be made to hold them against the threatening waters.

That the president of the board and the general manager of the company had arranged with the superintendent of the Illinois Central Railroad Company for the use of his car by the inspectors of the levee; that this car was attached to the train of the defendant at the time of the accident.

It seems that this special car had been switched off the track

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while an inspection was being made by the president of the board, and those who were with him on the inspecting tour.

In the afternoon, at the request of the general agent of the defendant company (who was, as we have seen, also an officer of the Levee District), an accommodation train of cars of the defendant company coupled on to the special car (at the rear) and thereafter formed part of defendant's train of cars operated under its management.

In order to complete the coupling of the special car to the train, it was necessary to connect the bell cord of the train with the bell cord of the special car. The flagman passed the bell cord through the eyelets (attached to the ceiling of the car) in order to connect this cord to that of the coach in front. While the flagman was passing it over the platform to the front car, the plaintiff testifies that he stooped out of the way of the rope, which was then, he says, touching the floor, and took a seat in one of the corners of the car in the rear, entirely out of the way of the bell rope, as he thought.

The bell cord was hanging loosely in the special car, within a few feet of the floor, when the flagman, gathering in the slack of the cord, violently drew the cord, and plaintiff was struck in the right eye, inflicting the injury of which he complains.

It is shown that the eye sight of plaintiff is impaired; that his vision in that eye is about one-sixth of what it should be in its normal condition; his left eye was injured by another accident several years ago.

The case was tried by jury and a verdict was rendered in favor of the plaintiff in the sum of five thousand two hundred and fifty dollars, with legal interest from December 14, 1894 (the date of the judgment), and cost.

From the verdict and judgment of the court the defendant appeals.

It is manifest that plaintiff sustained the injury on defendant's train. It was under its management and control, and it was responsible for the negligence of the employees. Such being our conclusion on that point, it devolves upon us to determine whether or not plaintiff was a passenger by invitation or a passenger riding on a free pass, containing printed stipulations to hold the carrier harmless against the negligence of his servants.

In order to place the facts upon this question properly before us,

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we return to the statement of facts, and from the evidence of defendant's general agent we extract:

Q. Mr. Thompson then accompanied you by your request in this special car, and he would not, under any circumstances, have been required to pay any fare?

A. No, he would not; for the reason that the railroad company gave transportation to all the members of the levee board and all connected with it, the engineer and secretary.

Q. Suppose he had no such ticket or pass, would he have been required to have paid fare on that trip?

A. No, he would not.

Q. According to that, he would not have been required to pay the fare, because you had arranged for the hauling of the car?

A. Not as long as he remained in that car; but if he had gone on any other portion of the train, he would have been compelled to show his pass or to pay his fare, if requested.

From the foregoing, we conclude that plaintiff was a passenger by invitation, without contract or stipulation.

The free pass has no place in the controversy. No offer was made to use it, and he was under no obligation to show a pass or pay for a ticket.

We will not assume that a stipulation was in force, and give it effect in the absence of evidence that the passenger was riding on such a pass.

From the fact that a person has a free pass, it will not be assumed, in the face of the request made here, of the plaintiff to ride in the officers' car, where fare is not charged, that he was using it on the occasion in question.

As there was no contract of carriage between the plaintiff and the defendant, can the carrier be held responsible for accidents caused by the negligence of servants?

That question was discussed at some length in a well considered case in the court of last resort in this country. *Philadelphia & Reading R. R. Co. vs. Derby*, 14 Howard (U. S.), 291, 292.

The principle that it makes no difference to the obligation to perform a service well after it is once entered on, whether it is performed gratuitously or not, is announced in that case, and that principle was followed in the case of *Steamboat New World vs. King*, 16 H. 260, 261, in which it was urged that the master had no power to impose any

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obligation on the carrier by receiving a passenger without compensation.

The degree of negligence for which the carrier may be responsible to such passengers was discussed without further absolute conclusion than that it is necessarily a question of fact. See authority last cited, *supra*.

The plaintiff was lawfully on the train. The authority of the general agent, under prevailing custom, gave him power to act and bind the company.

See also *Randell and Wife vs. N. O. & N. E. R. R. Co.* 45 An. 779, 787.

The evidence shows that the passenger was not riding on the train by invitation for mere pleasure.

At the moment he sustained the injury he and the general agent, Mr. Spellman, who was also president of the board, were in the act of examining charts and profiles of levees with the object of directing such repairs of these levees as were needful at the time. The defendant had an interest in these repairs; about eighty-five miles of its road are protected by these levees.

This brings us to the issue; defendant's negligence *vel non*.

The injury might have been provided against by due care and proper diligence on the part of the servant.

Having failed in this duty liability attaches for the consequences.

The proof is that the rope was pulled violently and without warning. There was no necessity of exerting great force in pulling up the taut.

It was the duty of the flagman to give warning to the passengers in a car, with interior arrangement excluding his sight from the rear to the front platform. Witnesses refer to the violent pulling of that rope as dangerous. The consequence in this case shows that it was very dangerous.

The Louisiana Code defines gross fault as that which proceeds from inexcusable negligence or ignorance. Art. 3556, No. 18.

We are of opinion that the act of the servant for which the master is responsible is embraced within the terms of that definition.

In regard to passengers the law of common carriers exacts the highest degree of carefulness and diligence.

The defendant, through counsel, argues that plaintiff, by want of ordinary care, contributed to his injury and is therefore barred from recovery.

The evidence does not disclose that the injury was due to plaintiff's fault or want of care.

The essential element of contributory negligence on the part of a passenger injured by an accident is his disregard of some risk which he might fairly have anticipated. Buswell, Law of Personal Injuries, 285.

A passenger is not put upon his inquiry, for he was not bound to anticipate negligence on the part of the defendant's employee. He did not violate any rule, nor did he fail to comply with any notice, for none was given. He was not in a place not intended for a passenger.

The defendant's flagman, by the exercise of proper care, might have avoided the accident that plaintiff did not foresee.

"It is well settled that the passenger who, voluntarily and unnecessarily places himself in a position of danger, can not hold the railway responsible for injuries of which his position is the efficient cause." Patterson's Railway Accident Law, 282, 283.

The record does not disclose that the passenger voluntarily and unnecessarily placed himself in a position of danger.

The only remaining question to be considered is the amount of the damages.

The oculists who testified differ somewhat as to the extent of the injury to the eye.

One of them testifies that, in his opinion, the iris is not substantially injured, and that by surgical operation it is possible to remove to a considerable extent the defect in plaintiff's vision. The diagnosis of the other oculist shows a condition less favorable to improvement.

Each agree in stating that the vision of the wounded eye would be greatly improved by the operation of "iridectomy."

The fact remains that, viewed in the most favorable light, the eye will never be restored to its normal condition.

After a careful examination of the evidence, and after having reviewed the authorities regarding the *quantum* of damages, we must reduce the amount of the verdict so that it may be in line as to the amount with prior decrees.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by reducing the amount from five thou-

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sand two hundred and fifty dollars to two thousand five hundred dollars; as amended the judgment is affirmed at appellee's costs.

No. 11,760.

RICHARD H. LEA VS. MRS. SALLIE E. HART, TUTRIX.

Services rendered to the grandfather of a minor, in the progress of a litigation, which resulted to the latter's pecuniary benefit, places upon her a legal obligation to compensate the attorney at law who conducted them the *quantum meruit* value of same.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Horace E. Upton and R. H. Lea for Plaintiff, Appellee:

The law imposes upon the grandfather the duty of taking charge of the tutorship, under the penalty of responsibility of losses, if he refuses. R. C. C. 268.

"The nearest male relative of a minor being bound to take charge of the tutorship under the penalty of incurring damages, is entitled, in applying for the tutorship, to take at once such conservatory measures as are necessary for the protection of the minor's property." And the fees of counsel in such cases are not dependent on success. Succession of Walker, 32 An. 321; Lacey vs. Lanaux, 19 An. 423; 21 An. 17.

Under tutors have the right to employ counsel to protect the interests of minors. R. C. C. 275; 5 An. 165.

The rights and functions of an administrator or executor are intransmissible. It is a personal trust, the violation of which is ground for removal. And when the grandfather, an applicant for the tutorship, found the entire assets of the succession in the hands of a person unknown to the court, it was his duty to have them sequestered. R. C. C. 268; Succession of Townsend, 36 An. 538, and authorities there cited; Succession of Walker, 32 An. 321; 31 An. 74; Hennen's Digest, 1388, No. 13; 36 An. 414.

"The under tutor is not personally liable for expenses of litigation in * * * proceedings on opposition to the tutor's account of administration unless he acted in bad faith." 19 An. 153.

Where a life usufruct claimed upon property valued at forty-five thousand dollars, the expectancy of said life being thirty years, is defeated, the amount of the recovery should be considered equal to the full value of the property.

An attorney's fee is contingent when its amount is dependent upon the amount of the fund from which it is to be paid. And a contingent fee is invariably larger than one not dependent upon the success of the litigation. 31 An. 130.

The character of the services, the interest involved and the ability of the client to pay, are factors to be considered in assessing an attorney's fee. 30 An. 336; 31 An. 130; 45 An. 194.

"A fee for services rendered under the eye of the court will not be reduced unless manifestly excessive." Interdiction of Leech, 45 An. 194.

Solomon Wolff for Appellant:

The attorney of an applicant for the tutorship of a minor is not entitled to compensation out of the estate of the minor, whether the application fail or succeed. Suc. Gorjon, 10 R. 541; Suc. of Florance, 36 An. 305.

Such services are rendered for the benefit of the applicant, and even if the minor benefits by those services, it is a benefit incidental to that sought to be obtained for the applicant, and the minor owes no fee therefor. Michon vs. Gravier, 11 An. 596; Wailes *et al.* vs. Suc. of Brown, 27 An. 411; Cooley vs. Oecile, 8 An. 51.

The opposition to the adoption of the minor by Mrs. Hart was, or, at least, might have proven detrimental to the interests of the minor, and no fee can be asked from the minor for such opposition. Renshaw vs. Stafford, 34 An. 1140.

The sequestration proceedings were ill advised, illegal and unnecessary; they might have proven extremely detrimental to the interests of all, and plaintiff is not entitled to compensation for provoking them. Poche vs. Creditors, 8 An. 66.

No compensation is due for the alleged recovery of the usufruct, as it had been renounced; at best, the obligation assumed by the tutrix made its recovery of small and extremely doubtful value to the minor.

The court will, itself, fix the value of professional services upon an examination of the entire record, regardless of the opinion of

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witnesses. Randolph, Singleton & Browne vs. Carrol, 27 An. 467.

An attorney will be concluded by a claim presented for professional services, although payment be refused. Suc. of Flower, 3 An. 292.

Argued and submitted, April 22, 1895.

Opinion handed down, May 20, 1895.

Rehearing refused, June 17, 1895.

The opinion of the court was delivered by

WATKINS, J. Plaintiff seeks to recover of the defendant the sum of five thousand dollars, the *quantum meruit* value of services which he rendered to her ward, as attorney at law in the matter of the succession of her father—she being the sole surviving legal and forced heir of the deceased, and said services having enured to her benefit.

His claim mainly rests upon the hypothesis that: (1) He was instrumental in recovering for the minor an allowance of one thousand six hundred and twenty-five dollars, on the amount of the share which was coming to her from a former community; (2) in striking down and ridding the realty which was bequeathed to her by her father's will, worth forty-five thousand dollars, of a lifetime usufruct which was asserted by the surviving widow of the deceased—the stepmother of the minor.

The defence is threefold: (1) That the services of the grandfather of the minor, whom plaintiff represented, were *ex gratia* under the law, and placed upon the minor no legal obligation to pay for the services rendered by the plaintiff; (2) that the services rendered by the plaintiff were not beneficial to the minor, and accomplished nothing, of themselves, which would not have otherwise resulted; (3) that the amount claimed is excessive and oppressive.

On the trial these questions were thoroughly traversed by the litigants, and testimony *pro* and *con* adduced; and judgment was pronounced in favor of the plaintiff, and the defendant has appealed.

Junius Hart died on the 20th of September, 1893, and his estate was placed under administration on the 9th of October following. He left a will, by the terms of which, Lena Cecile Hart, a minor child and sole surviving forced heir, having been born of the second

marriage, was bequeathed the property known as No. 191 Canal street, at the corner of Burgundy street, in the city of New Orleans, and his surviving widow, being of the third marriage, was bequeathed the balance of his estate and the usufruct of his share of the community property.

The will contained the further stipulation that the surviving widow should be the executrix, and one Washington P. Simpson tutor for the minor, and Dr. John J. Johnson alternate.

An estimative inventory was made and disclosed that the decedent's estate aggregated one hundred and twenty-four thousand four hundred and two dollars and forty-three cents in value; and of this, fifty-four thousand five hundred dollars was attributed to real estate, and sixty-nine thousand nine hundred and two dollars and forty-three cents to the movable effects of various kinds.

The judge declined to confirm the appointment of Simpson as testamentary tutor to the minor, because he was a citizen of Georgia; and thereupon Wm. A. Arnold, as paternal grandfather of the child, acting on the advice of plaintiff as his counsel, presented a petition to the court praying to be appointed tutor, reciting the action of the court in failing to confirm the appointment of Simpson, and further alleging that Dr. Johnson, the alternate testamentary nominee for the tutorship, was likewise disqualified, being a citizen of Mississippi.

Soon afterward, Dr. Johnson appeared in court, petitioning for his confirmation as dative tutor, alleging himself to be a citizen of Louisiana.

To this application the grandfather filed an opposition, and prevented the issuance of letters of tutorship to him.

Subsequently the grandfather instituted proceedings and obtained a judicial sequestration of all the movable effects of the estate of the deceased, and had them taken by the sheriff out of the possession of one Julius Winter, to whom they had then been only recently confided by the surviving widow, under a power of attorney which conferred upon him unlimited powers of administration, and which specially authorized him "to do and perform such acts connected with the administration of the estate of the decedent, as it was only competent for her as executrix, personally to perform," etc.—the allegation of his petition being to the effect "that the said power of attorney was and is * * * intended to vest the said Julius Win-

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ter with full authority to administer the affairs of the succession whether the executrix was present or absent."

It was also alleged in the grandfather's opposition to the appointment and confirmation of Dr. Johnson as tutor, that he had contemporaneously executed a similar procuration to Julius Winter, containing broader and more extensive powers.

About the same time, Simpson obtained an order of appeal from the decree of the judge, refusing to appoint him tutor.

A little later, the property sequestered was bonded and released to the surviving widow.

Subsequently, one John Booth made application to be appointed tutor to the minor, the petition having been signed by the same counsel who had appeared for the widow in the proceedings above related. Nothing came of all these applications, as the grandfather furnished the requisite bond and security, and his appointment was confirmed.

In the meantime the widow moved to dissolve the sequestration without avail, and she thereupon filed her answer, setting up claim that all the estate was property of the late community between herself and her deceased husband, except the premises, 191 on Canal street, and that, although it was purchased prior to their marriage, and on that account an asset of a previous community, yet same was paid for to the extent of twenty thousand dollars out of funds of the last community of which she was a member, and repaired also to the extent of eighteen thousand dollars, likewise with such community funds.

This claim in her answer was, in effect, to charge the separate estate of the deceased, that is, to say, the premises, 191 Canal street, which had been bequeathed to the minor with a debt of thirty-eight thousand dollars in favor of the last community, of which the widow was owner of one-half, and usufructuary by will of the remaining one-half during the period of her natural life.

Soon afterward the widow petitioned to the court to allow her to adopt the minor, and to that end prayed for the appointment of a tutor *ad hoc* to consider her application. This appointment was opposed by the grandfather on various grounds, but his opposition proved of no avail, and the appointment was made, the adoption of the minor approved and consented to, and the tutorship of the grandfather terminated.

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With the termination of the tutorship the sequestration proceedings ended, and the widow resumed the administration of the estate.

A few months later the widow filed her final account as executrix, on which she placed the minor as a creditor for the sum of five thousand dollars, as the net amount of cash due her from the former community, and as the owner of the premises 191 Canal street, subject to her testamentary usufruct, making claim for herself that she was, by the terms of the will, "constituted residuary legatee and usufructuary for life of the aforesaid property bequeathed to the minor."

The grandfather having been appointed and confirmed undertutor, opposed the account, claiming for the minor interest on its inheritance from its mother; that the sums paid on the property, 191 Canal street, during the existence of the last community, were in fact paid out of her father's separate estate acquired before his last marriage; and that the widow, as residuary legatee, was not entitled to any greater sum than one-third of the deceased's separate estate, and under no condition to the usufruct of the property beyond the child's majority.

After quite a protracted trial there was a judgment sustaining the opposition; (1) so as to allow the minor interest on the five thousand dollars inheritance; (2) so as to disallow the widow's claim to usufruct upon the property which was bequeathed to the minor from the separate estate of the deceased.

It is upon this statement that the plaintiff predicates his claim for services as an attorney representing the interests of the minor in this protracted and complicated litigation.

In his reasons for judgment we find a carefully digested summary of the foregoing proceedings, coupled with his observations upon their progress and result, of all of which he was personally cognizant, same having been conducted in his court, and immediately under his supervision.

And in this connection we can not *as well* state the reasons which influenced the mind of the judge *a quo*, as he has stated them herein, and we will append the following extract in place of observations of our own, viz.:

"By the terms of Junius Hart's will the minor was to get the real estate on Canal street, and the widow was to get the balance of the estate, as also the usufruct of the community property.

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"The estate owed the minor five thousand dollars, being the amount inherited from her by her deceased mother, together with interest thereon from the date of the mother's death. I believe there was never any question as to the obligation for the principal amount, but the obligation for the interest was not recognized until the claim therefor was made by the plaintiff herein on behalf of the minor.

"It was claimed by the widow that the usufruct conferred by the will included the real estate on Canal street, and this claim was contested on behalf of the minor by the grandfather, represented by the plaintiff, with the result that the minor was adjudged to be entitled to the usufruct as well as the ownership of said property, which is valued at forty-five thousand dollars. It is said that the particular point upon which the judgment in question was predicated was not suggested by the plaintiff. Whether this be so or not, it was the opposition filed by him which necessitated the investigation by which the attention of the court was attracted to the fact that the will gave the widow the usufruct of the community property, whilst the property in question was bought, though not entirely paid for, before the last marriage. In any event the opposition must have been good upon the grounds taken, in so far as to reduce the usufruct, in order that it might not infringe on the *legitime* of the minor.

"In the final account of the widow as executrix, it is said that the community between herself and her late husband should be held as of the value of ninety thousand two hundred and fifty-one dollars and one cent. In the judgment on that account, ordering its amendment, the value of said community is fixed at seventy-six thousand eight hundred and seventy-nine dollars and two cents. And whereas, by the terms of said account, the minor was to receive the five thousand dollars due her from her mother's estate, without interest, and the naked ownership of the real estate on Canal street, subject to the usufruct, for life of the widow, by the terms of said judgment she gets said five thousand dollars, with interest to the amount of one thousand six hundred and twenty-five dollars and the usufruct as well as the ownership of said real estate. The intervention by the maternal grandfather of the minor in the succession proceedings, for the purpose of requiring that the minor be provided with a tutor agreeable to the law of the State was not only authorized, but

obligatory. And when, by act of the executrix, the movable effects of the succession in which the minor's fortune was involved, was left in a position which the law did not contemplate or authorize, it was his duty to take such steps as he considered necessary for its protection. And it is no answer to this proposition to say that the executrix considered the property safe, since it is to be presumed that if the law-maker had so considered the other and different provisions contained in the law for its security would not have been made. That it was the duty of the grandfather to claim the interest due to the minor, and to claim the usufruct of the real estate, there can be no question. And if these different services were rendered in the discharge of a duty resting upon the grandfather, and that duty could only be discharged by the aid of an attorney, and was so discharged for the benefit and in the interest of the minor, there can be no ground upon which to rest the defence set up in the answer that the minor owes said attorney nothing. The only question is how much the minor owes? And this question is to be determined by the character of the services, considered in connection with the value of the interest involved.

"The character of the services has been mentioned, they extended over a period of about eight months, during which there was scarcely a day upon which the plaintiff was not called on to give some portion of his time and attention to the affairs of the defendant, and there was not a moment during which his mind was relieved of the responsibility which developed upon him. The outcome and net result to the minor of his services is, that instead of having five thousand dollars in cash, and the naked ownership of a piece of real estate, valued at forty-five thousand dollars, but encumbered with a usufruct in favor of another person for a life estimated at thirty years, she gets six thousand six hundred and twenty-five dollars in cash, and the usufruct of said property at once, and from this time forward, free of all encumbrance."

His conclusion was that the services were valuable to the minor, and that same placed upon her a legal obligation to compensate the plaintiff the *quantum meruit* value of the services he rendered.

It is quite evident from a casual inspection of the proceedings we have outlined, that the surviving widow and stepmother of the minor resorted to every means in her power to improve her own situation, by increasing the amount of the community at the

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expense of the separate estate of the minor; and sought to tax the separate property which was bequeathed to the minor to the extent of thirty-eight thousand dollars, and to enlarge her testamentary usufruct so as to cover it, and by so doing, control and utilize its revenues during her lifetime.

Notwithstanding she adopted the minor by regular judicial proceedings, this was only done after her means of defence were apparently exhausted, which gives rise to the just apprehension that she perceived something in such a course that might be turned to her advantage; and this, we find in her final account, which the grandfather of the minor as undertutor felt bound to oppose, and whose opposition was fruitful of good results to the minor.

On the proof adduced the judge *a quo* fixed the net income of the minor's property at two thousand three hundred and fifty dollars, and the widow's expectation of life at thirty years, basing his estimate upon standard life tables.

In other words, at that rate the minor has a reasonable prospect of realizing from that source alone sixty-seven thousand five hundred dollars, approximately.

On that question considerable discussion has been indulged in, with the object of showing the inaccuracy of the judge's estimate. But, in our opinion, a nice calculation need not be made, as in this case the question is of the value of the plaintiff's services, and an approximate valuation of the minor's property is all that is necessary or useful for that purpose. And based on such valuation, it appears that forty thousand dollars is about the present cash value of the use of the real estate of the minor on which the plaintiff's fee is to be calculated, independently of the five thousand dollars that is coming to her from her mother's estate; and to this extent, at least, the minor has been benefited by the litigation which was advised and conducted by the plaintiff.

The amount claimed by the plaintiff was allowed by the judge *a quo*, in whose court the whole of the litigation was prosecuted; and a careful examination of this case has only served to confirm his conclusions as both just and conscientious, but we think the amount allowed is excessive.

The rule with regard to the allowance of attorneys' fees in any given case is, in our opinion, very correctly and concisely stated in *Breaux, Fenner & Hall vs. Francke*, 30 An. 336, in these words, viz.:

"Two factors enter into the calculation of fees for services such as those rendered by the plaintiffs. One is the extent and kind of service, and the labor incident to its rendition, and the other is the ability of the party who is liable to pay."

Much the same rule was stated in Succession of Linton, 31 An. 130, and in Succession of Mager, 12 Rob. 413. It was said that "the labor of an attorney * * * ought to be rewarded according to its nature, extent and degree of skill and care it demands."

In a case somewhat similar to this, the court said:

"We do not understand that the compensation of counsel in such case depends upon success, and as the undertutor receives no compensation, and has no direct pecuniary interest in the result, we think he can not be held liable in case of failure, unless, indeed, it appear that he acted in bad faith. * * *

"Upon an examination of the questions properly involved in the pleadings, under the law applicable to such proceedings, the amount of the legal labor required, and the opinion of two district judges before whom the proceedings were conducted, we have come to the conclusion that a fee of one thousand dollars each will be a fair and just reward to the plaintiffs, to be paid by the minor." Lacey vs. Lanoux, Tutrix, 19 An. 153; Succession of Samuels, 21 An. 15, is to same effect.

In the interdiction of Leech, 45 An. 195, this court adopted the rule for the admeasurement of the fees of counsel which was established in Breaux, Fenner & Hall vs. Francke, *supra*, that "the knowledge of the attorney applied to the suit; his responsibility and labor are *criteria* of value in fixing his fee; and that a fee for services rendered under the eye of the court, will not be reduced unless manifestly excessive."

We have examined Cooley vs. Cecile, 8 An. 51; Wailes vs. Succession of Brown, 27 An. 411, and Michon vs. Gravier, 11 An. 596, which are cited in the brief of defendant's counsel, and find them inapplicable to this case. Same is true of Watson vs. Ledoux, 8 An. 68.

Under the facts of this case, as applied to the authorities cited, we are of opinion that the amount claimed is excessive, and that the judgment should be reduced to fifteen hundred dollars.

It is therefore ordered and decreed that the judgment appealed from be reduced to fifteen hundred dollars, and that, as thus amended, the same be affirmed at appellee's cost.

No. 11,858.

SUCCESSION OF DR. EUGENE RABASSE.

The heir of the executor is not bound to pay the mortgage debt placed by the testator on the thing bequeathed, *i. e.* the special mortgage, unless that payment by the heir or executor is directed by the will. Civil Code, Art. 1638, 1441, 1442, 1443, 1444; 3 An. 175; 34 An. 709; 43 An. 144.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

L. de Porter for Plaintiff in Rule, Appellee, cites:

C. C. 1430, 1431, 1642, 1440, 1484, 1634, 1636; 5 An. 199; 12 An. 5; 8 An. 142; Marcadé, Vol. 4, *Donations et Testaments*, pp. 97, 102, 103; Marcadé, Vol. 3, *des Successions*, pp. 259, 270, 271 and 94; Code Napoleon, Arts. 871, 874, 1020, 1024, 1018; Art. 226 Code of 1808; Art. 1383 Code of 1825.

Henry Chiappella, J. Numa Augustin, and Theodule Buisson for Appellants, cite:

R. C. C. 1638, 1440, 1441, 1442, 1443, 1642, 1430, 1434, 2161, 3410; C. N. 871, 873, 874, 1020; Succession of Sinnott, 3 An. 175; Succession of Coste, 43 An. 144; *Eskridge vs. Farrar*, 34 An. 709; 3 Chabot Successions, 274, 242; Rogron Code Annoté, pp. 211, 213, 249; Paillet, pp. 341, 425; 2 Lacantinerie, pp. 425, 430; 1 Boileux, 659, 660; Favard-Langlade, 406, 274; 2 Troplong Testaments, 556, 178; 16 Merlin Répertoire, 816, 512; 1 Grenier Testament, 177, 561; Coin-Delisle Testaments, 477; Code Civil Annoté par Lahaye, 376, 459.

At the trial His Honor the Chief Justice propounded to counsel whether the work and report of the jurists who framed the Code of 1825 had been consulted, and how far it threw light on the apparent inconsistency between Art. 1434 R. C. C. and the four articles 1440-1443 R. C. C. They have been fortunate in finding a copy in the French language of the "Additions and Amendments to the Civil Code of Louisiana" proposed by the commissioners in 1824, the greater part of which were incorporated in the Code of 1825.

It has been said in argument that our present Articles 1434 and 1638 correspond to Articles 874 and 1020 respectively of the Code Napoleon. They are also found in our Code of 1808, being Art. 226, at page 200, under the heading "Payment of Debts," and Art. 146, at page 240, under the heading "Legacies"—the phraseology not differing to any great extent. It is well known that Arts. 1440, 1441, 1442, 1443 are new articles inserted in the Code of 1825, and not existing in either the Code of 1808 or in the Code Napoleon. The idea readily suggests itself that the framers of the Code intended to inject into our legislation, in emphatic and clear language, the principle that the particular legatee should take the legacy *cum onere* and without recourse against the heirs. They were led to this course because they had found the French commentators puzzled as to the proper mode of reconciling Arts. 874 and 1020 of the Code Napoleon. They thought that they had set the matter at rest. But the doomed Art. 1434, like Banquo's ghost, now rises again from its unsealed grave to disturb our councils.

What is the language used by these eminent jurists in their report to the Legislature? After suggesting that Art. 226 of the Code of 1808 (which is our Art. 1436 R. C. C.) be followed by seven new articles (our present Arts. 1437, 1438, 1439, 1440, 1441, 1442, 1443), they add by way of note or remark as follows:

"The dispositions contained in these articles are amendments to Art. 226 of the Code, which we have suppressed above. Such article in granting to the particular legatee, who pays by reason of the hypothecary action, recourse against the heirs of the testator, is in contradiction with Art. 146 of Donations and Testaments, which says that the heirs are not bound to discharge the thing bequeathed of the incumbrance placed upon it by the testator. We have thought proper to correct this disposition, in conformity with the opinion of the best authors, who would have it that in such cases the legatee has no recourse against the heirs, but on the contrary, the latter may have recourse against him, whenever they would discharge the mortgage subject to which was the bequeathed immovable." (Translation by the counsel.)

Amendments to Code of Louisiana, pp. 196, 197.

It thus appears from the lips of these compilers or framers of our laws that they had suppressed Art. 226 of the Code of 1808 (R.

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C. C. 1434.) Yet it found its way again in our Code of 1825—alongside of its new neighbors and opponents—as if it had not been abrogated. Was this an oversight and a clerical error? Or will it be said that the Legislature disregarded and repudiated the proposed innovation suggested by the jurists? How then could the Legislature have agreed to adopt their recommendations in regard to the four new articles to be inserted in our Code. Then comes the codification of 1870 with all these articles re-enacted *totidem verbis*.

An explanation which is plausible would limit the application of Arts. 1440, 1443, to particular legatees who are not heirs of the deceased testator; and so of Art. 1638. And on the other hand, Art. 1434 and the one preceding it, as well as the five succeeding it, would have reference to particular legatees who are also heirs of the testator. The reason of this distinction is to be found in the equality which must exist between co-heirs. It should be here remarked that Art. 1440—the first of the four articles treating of legatees who are not also heirs—says: “If a property which is bequeathed to any one has been mortgaged,” etc. How different is the language of R. C. C. 1433, which renders the heir bound to pay the whole debt by the hypothecary action, but reserves to him “recourse against his co-heirs, or the other successors standing in their place. for the amount which he has been bound to pay for the discharge of the mortgage debt.”

In our former brief we have adverted to the difference in the phraseology of Art. 1434 and of Arts. 1441 *et seq.*—the former of which speaks of subrogation, while the latter use the word recourse. If subrogation carries with it recourse, how could one article give to the particular legatee what the other articles refuse him? What the motive of the Legislator was in not using the same expressions, if they were synonymous, remains a mystery to us.

In regard to the weight to be given to Art. 1642 and to the principle that particular legatees are not liable for succession debts, why should it be contended that the provisions of Arts. 1441, 1442 can not be reconciled therewith? Does not Art. 1642 prescribe that the particular legatee shall be liable to the action of mortgage on the part of the creditors of the succession? Why

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should he not, in such a case, be refused all recourse against the heirs, as Art. 1441 ordains?

This is not a matter of paying succession debts; it is more properly the receiving of a particular legacy *cum onere*, as would be the case of a usufruct. Indeed, the article itself furnishes the explanation; because by receiving the legacy he is considered as having received it with the incumbrances with which it was charged. R. C. C. 1441.

And to the same effect are the words contained in the following article: "To be reimbursed (the heirs) for having discharged and disengaged the object bequeathed, which they were not obliged to do. R. C. C. 1442.

Argued and submitted, May 24, 1895.

Opinion handed down, June 3, 1895.

The opinion of the court was delivered by

MILLER, J. The question in this case is whether the special legatee of the immovable is bound for the debt contracted by the testator, subsequent to the will, and which he secures by mortgage on the immovable. The judgment of the lower court made the heirs and executors liable.

The articles of our code like those corresponding in the Napoleon Code seem to exhibit some conflict. The articles, 1688, 1440, 1441, 1442 and 1444 all tend to pass the property to the special legatee subject to the mortgage, that is the executor, heir or universal legatee, is to deliver the immovable in the condition it is when the testator's death occurs, and is not bound to discharge the mortgage debt. It is the explicit declaration of the first of these articles that, if prior to the testament or subsequently, the testator mortgages the subject of the special legacy, whether for his own or for the debt of another, the heir or universal legatee or executor is not bound to discharge the incumbrance, unless required by an express disposition of the testator. This article is found in that part of the Code that treats of particular legacies, the rights of the legatee and the obligations of the executor and heirs of the testator, with respect to the legacy. Under one of the subdivisions of the rubric of the Code, "of the payment of the debts of the succession," the four articles, 1440 to

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1444, declare the liability of the particular legatee to the hypothecary action of the creditor holding the mortgage on the property bequeathed, reserving to the legatee the right to abandon. If abandoned, there shall be no recourse of the legatee on the heir, for it is declared the legatee received the property subject to the incumbrance with which it is charged; if, on the contrary, the heir pays the mortgage, he shall recover from the special legatee for disengaging the thing bequeathed, which he was not obliged to do; and finally, if the mortgage was granted by the testator for the debt of a third person, in that case the articles confer on the legatee the right to recover from the third person the same as if the testator could if he had made that payment. The articles 1441 to 1444 were additions to the Code of 1825.

The jurists who reported the code of 1825 thought these four articles, 1441 to 1444, essential to settle the doubt they conceived to exist as to the non-liability of the heirs for the mortgage debt on the property specially bequeathed. That doubt they conceived to arise from Art. 226 of the Code of 1808 declaring the particular legatee paying the mortgage debt, should be subrogated to the creditor's rights against the heir. The jurists advised the suppression of that article. But notwithstanding the recommendation the article found its way into the code of 1825 as Art. 1883, now 1434, of the Revised Code. Along with it, however, are the Arts. 1441 to 1444. It may well be that the insertion of these four consecutive articles, all distinctly affirming the liability of the special legatee, or at least of the property bequeathed for the mortgage debt, was deemed entirely sufficient to preclude any future doubt on that point. In that opinion we concur. The added articles are couched in the plainest language. They affirm the liability of the property the subject of the special legacy, for the mortgage debt resting on it. They expressly deny any such liability of the heir, and if he is compelled to pay, gives him an action to recover from the special legatee. This language, enough in itself, is aided by the light we have of the purpose of the additions to the code.

The jurists of 1825 had reason to suggest the divergent views of the French commentators on the articles in the Napoleon Code on the subject. Art. 1020 of that Code, corresponding with 163 of our Code, announced that the particular legatee was bound

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to pay the mortgaged debt on the thing bequeathed, unless the testator directed otherwise. But Art. 874 of the Napoleon Code, like our Art. 1484, subrogated the legatee, who paid to the creditor rights against the heir. In favor of the liability of the heir were Marcade, 4th Vol. 95; Toullier, 5th Vol. 538; Chabot and Laurent may be added, 14th Vol. 97. The jurists were impressed with the better opinion as they esteemed it, that unless charged by the testator there was no such liability of the heir as implied in Art. 874 of the Napoleon Code. The discussion by some of the French jurists reconciles the seeming conflict between the articles of the Napoleon Code, by supposing that the Art. 874, corresponding with our Art. 1484, applies only to general mortgages. If the special legatee pays the mortgage bearing on all the property of the succession, there is in the subrogation against the heir conferred in that case no inconsistency with the article that burdens only the property specially mortgaged with the mortgage upon it. Another and obvious mode of harmonizing the articles is that thus expressed: "Il faut entendre que l'article 874 s'applique au cas ou l'heritier a ete charger par le testateur de fournir la chose leguee franche et quitte de toutes charges et l'hypothèque, et dans tout autre cas l'article 1020 (i. e., that frees the heir or executor from any liability for the special mortgage) met l'heritier a l'abri du recours de legataire." Gilbert Code Anotes. Notes to Art. 1020. There is still another view cited from Gilbert, suggested in Paillet Manuel de droit Français. Notes on Arts. 1020 and 874. We think that even under the articles in the Napoleon Code, and those in our Code before the additions of 1825, admitted of full effect on the familiar rule of interpretation that assigns to each its scope and gives effect to all.

The discussion with us however must be deemed closed. If Arts. 1441 to 1444 of our Code had been in the Code Napoleon, it is not conceivable that the discussion of the French commentators could have ever occurred. As the Code now stands, there can be, in our view, no doubt the heir or executor is not bound to pay the mortgage debt on the property the subject of the special legacy, unless required by the will. There is in this case no such requirement. It is to be observed that our jurisprudence, as far as it goes, affirms our conclusion. Succession of Sinnott, 3 An. 175; Succession of Coste, 43 An. 144; Eskridge vs. Farrar, 34 An. 709.

It is therefore ordered, adjudged and decreed that the judgment

 Blood et al. vs. Negrotto.

of the lower court be annulled, avoided and reversed, and that there be and hereby is judgment in favor of defendants in rule, with costs.

No. 11,792.

F. L. BLOOD ET AL. VS. DOMINGO NEGROTTA, JR.

The case of *Remick vs. Lang*, ante, page 914, affirmed.

Breaux, J., dissenting—The former owner having been divested of title, he was no longer concerned about the payment of taxes assumed by the purchaser at the tax sale. It was a matter in which the State alone had an interest, and only to the extent of the payment of the taxes assumed.

A PPEAL from the Civil District Court for the Parish of Orleans.
Theard, J.

*Frank L. Richardson and Kernan & Wall** for Plaintiffs, Appellees.

Farrar, Jonas & Kruttschnitt and J. Zach. Spearing for Defendant, Appellant:

I.

In view of the opinion of this court in *Remick vs. Lang*, we do not discuss the character of this action.

II.

The want of notice, pleaded as a ground of nullity of the tax title herein, is notice of the sale under Act 82 of 1884.

No want of notice of the sale to the State is either alleged or proved.

Plaintiff has no interest in attacking the sale under Act 82 of 1884.
Breaux vs. Negrotto, 43 An. 432.

III.

(a) All rights of redemption by the original owners of the property described in the petition were gone one year after the adjudication to the State. *Remick vs. Lang* seems to admit this. See Sec. 62 of Act 80 of 1888. See all tax laws since 1879. See Art. 210, Constitution of Louisiana.

(b) After that year the original owner is as much a stranger to the title as any other citizen.

*These gentlemen were the counsel in *Remick vs. Lang*, 47 An. 914.—REPORTER.

IV.

- (a) The State being the absolute owner, in perfect ownership, of the property in dispute, sold it to Lake, who acquired a title perfect against all the world, and by this court specially declared to be perfect against the former owner. The title so acquired was one in fee simple, for a fixed price in cash, upon payment whereof he was entitled to a deed and to possession, subject, however to and with the promise on his part, to pay all taxes for 1880 and subsequent years. See Act 82 of 1884.
- Jurisprudence reviewed to prove foregoing proposition: *State ex rel. Martinez vs. Tax Collector and City*, 42 An. 677, *et seq.*; *Breaux vs. Negrotto*, 43 An. 427; *State ex rel. Powers vs. Recorder of Mortgages*, 45 An. 566; *Reinach vs. Duplantier*, 46 An. 161.
- (b) No time is fixed by law for the payment of the taxes of 1880 and subsequent years. Lake and those holding under him are therefore still entitled to make the payment as no putting in default has ever taken place. By payment the heirs of Blood may have been subrogated to the rights of the State to demand such payment. Greater rights they certainly did not acquire.
- (c) Upon the failure of Lake, or those holding under him, to pay the portion of the price payable *in futuro*, the State had ample remedies, to-wit:
1. To collect her taxes, as she was doing in the Martinez case when she was enjoined, and as this court said she had a right to do; or
 2. To rescind the sale for non-payment of price.
- (d) Neither of these rights has in any manner whatever passed to plaintiffs, nor are they trying to assert either of these rights.
- (e) Plaintiffs are strangers to the title, and trespassers.

V.

If the State remains the owner only to collect the taxes due; if the tax sale under Act 82 of 1884 is conclusive as against the former owner, as soon as the adjudication is completed and becomes equally conclusive as against the State as soon as the purchaser pays the taxes for 1880 and subsequent years, all of which is held in Martinez case, then we submit that:

Redemption does not create a new title; its only effect is to remove the tax sale as an encumbrance or cloud on an otherwise clear title; it does not necessarily enure to the benefit of the party paying the money, but to the benefit of a pre-existing title.

Reddy, Wife, vs. Carroll, Husband.

Motse & Cahn for Defendant, Appellee.

Argued and submitted, May 23, 1895.

Opinion handed down, June 3, 1895.

Rehearing refused, June 21, 1895.

The opinion of the court was delivered by

WATKINS, J. This is an action for divorce *a mensa et thoro*, grounded upon abandonment by the husband.

During the progress of the suit plaintiff took a rule on the defendant to show cause why alimony of one hundred dollars per month should not be allowed her during the progress of the trial and the pendency of the suit. It is the supplement of suit of same title, reported in 42 An. 1071.

In that case an effort was made by the plaintiff to coerce her husband to return to the matrimonial domicile, or in default of so doing to pay her alimony at the rate of one hundred dollars per month. A judgment to that effect having been rendered in 1884, plaintiff sought to have same revived; but in that effort she was defeated because her demand for alimony was not accompanied by any demand for a separation from bed and board, or divorce—the decree maintaining that independent suit for alimony was an anomaly and not permissible in law.

The present suit was commenced immediately after the judgment in the former had become final, doubtless with the view of supplying the suggested omission therein.

The petition alleges the marriage, subsequent abandonment by the husband without any just cause, leaving plaintiff without any means of support or maintenance, or funds with which to provide herself with the necessities of life. It charges that his conduct was without justification or excuse, the petitioner having always been faithful to her marriage vows in religion and in law.

It alleges that she has been supported through the assistance of her relatives since the time of this abandonment, more than twenty years ago, the defendant never having communicated with her since.

That he has since returned to Louisiana, where he now permanently resides, and is in the possession of a fortune of about thirty

Reddy, Wife, vs. Carroll, Husband.

thousand dollars, through an inheritance from his deceased father, and has revenues ample to allow her alimony *pendente lite*, in the sum of one hundred dollars per month. Her prayer conforms to her allegations.

The case was, after a very protracted delay, put at issue by an answer, which is practically a general denial, coupled with the special averment, that he is poor and unable to support his wife in the style in which she would like to live, while she is comfortably "living under the roof of one of her relatives," and has no need of alimony.

Finally, that he is willing to have plaintiff return to him, if she is willing to return and live with him as becomes his means.

There was a trial and a judgment rendered, of which the plaintiff complains, because it rejects and disallows her demand for alimony, and with which the defendant expresses himself satisfied, because, in his opinion, it disposes of the case in his favor, on the merits.

There was considerable difficulty on the trial between the respective counsel, and a great number of bills of exception in the transcript attest the vigor of the controversy between them. Certain it is, that very much of the evidence which the plaintiff's counsel sought to introduce, and which, upon objection by the defendant's counsel, was rejected, was wholly inapplicable to a trial of the issue of alimony *vel non*; and it is equally certain that the condition of the record was such that it is unlikely that plaintiff's counsel would have voluntarily gone to trial on the merits.

In this state of uncertainty, an appeal to the record furnishes us but little help in solving the difficulty.

From what we have quoted from the record, it is evident that the plaintiff has a cause of action, and we do not feel that she should be turned away from the portals of justice empty handed, with her suit dismissed and a judgment against her for costs. The purposes of justice would be best subserved by reversing the judgment and ordering a new trial, either upon plaintiff's demand for alimony *pendente lite*, or upon the merits of the principal demand for a separation from bed and board, as may be deemed preferable.

It is therefore ordered and decreed that the judgment appealed from be annulled and reversed; and it is further ordered and decreed that the cause be reinstated and remanded for a new trial, according to law and the views herein expressed, the cost of appeal to

 Reems vs. Recorder of Mortgages et al.

be taxed against the defendant and appellee, and those of the lower court to await final judgment therein.

No. 11,815.

EUGENE S. REEMS VS. RECORDER OF MORTGAGES ET ALS.

The mortgage and privilege to secure the payment of the taxes were prescribed at the date of the sale; but the taxes, if a legal assessment had been made, were due to the city, which remained an ordinary creditor for the amount of the taxes.

But there is no ordinary claim here, for the assessment was a nullity. There is confusion regarding the name of the tax payer and only part of the property was assessed, while the defendant purchaser claims under the tax proceeding and sale, title to the whole property.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

John Watt and Kernan & Wall for Plaintiff, Appellee:

In an action *in jactitation*, defendant who answers, setting up title in himself, assumes the *onus probandi* and must make out his case; defendant, under such circumstances, occupies the position of plaintiff in a petitory action. 9 M. 914; 18 La. 102; 2 R. 331; 11 An. 174; 12 An. 873; 27 An. 307; 35 An. 356; 33 An. 249; 32 An. 613; 40 An. 558; *Remick vs. Lang*, 47 An. 914.

The city of New Orleans has no right to advertise and sell, under Act No. 155 of 1894, any property other than that to which she has a valid title.

To divest the title of the owner, the adjudication of his property for taxes must be preceded by notice to him. Const., Art. 210; 46 An. 356; 48 An. 721; 30 An. 871.

One of the requisites of a valid sale of property for taxes is that the whole amount for which the sale is made must be due at the time the sale is made. *Rouglot vs. Quick*, 34 An. 126; *Cooley on Taxation*, 322; *Saunders on Taxation*, 302. No taxes were due the city of New Orleans on the property involved in this suit, for the year 1884, in 1891, the date of the pretended adjudication to the city.

An assessment by an insufficient description and in a wrong name is no assessment. In this case it is not shown that plaintiff ever ratified the assessment of 1884 by paying the State taxes.

Reems vs. Recorder of Mortgages et al.

The city taxes, tax mortgages, liens, privileges and rights of pledge for the year 1884 were prescribed under Sec. 34 of Act No. 96 of 1882. Concurring opinion of Mr. Justice Watkins, Succession of Stewart, 41 An. 181; Succession of Girardey, 44 An. 548; State *ex rel.* Dowers, 45 An. 571.

The city of New Orleans has no mortgage, lien, privilege or right of pledge for its taxes, until her delinquent list is registered in the mortgage office, and she is without authority to seize and sell, for taxes, property which is not described on her delinquent list duly registered according to law. Secs. 33, 34, Act No. 96 of 1882.

Dinkelspiel & Hart appeared for the Sheriff, made party, also Appellee.

E. A. O'Sullivan, City Attorney, *Horace L. Dufour*, Assistant City Attorney, for Appellant:

The assessment under which the property in suit was sold to the city, and the adjudication to the city, are valid.

Plaintiff having paid the State tax and assumed the city tax on an assessment is estopped from denying the validity when payment of the city tax is enforced. 44 An. 277.

Statement of plaintiff that he does not remember receiving a notice is not sufficient to rebut the presumption that a public officer has done his duty, coupled with a return in writing that he made such service.

The assumption by plaintiff of an imprescriptible tax, makes the property in his hands liable to seizure and sale therefor, although the privilege is prescribed. 41 An. 128; 42 An. 1135; 43 An. 810.

Should the city's title be annulled, its right to enforce the tax by seizure and sale of the property should be reserved.

Argued and submitted, May 23, 1895.

Opinion handed down, June 3, 1895.

Reems vs. Recorder of Mortgages et al.

The opinion of the court was delivered by

BREAUX, J. The plaintiff was the owner of two lots of ground, numbered 3 and 4 (less eight feet on Second street), on a plan numbered 41.

In his suit, which he alleges is one of jactitation, he sets forth that he became the owner by purchase of these lots from Mrs. Cornelia A. Calmes, widow of W. C. Black, and others. That the Recorder of Mortgages has recorded a copy of the delinquent tax roll for 1884, in the name of Widow Cornelius Black, amounting to one hundred and sixty-two dollars and sixty-eight cents in principal. That this inscription is null, because the property was not assessed in the name of the owner, and for the further reason that the property was not correctly described upon the assessment roll. That it was described as parts of lots 3 and 4, despite the fact that the property's correct description is lot 3 and part of lot 4. That the taxes were prescribed.

The plaintiff also alleges that the city of New Orleans pretends to own the property under a pretended adjudication, based on the void assessment for 1884, duly registered, and that this fraudulent title is a cloud and slander on his title, which he prays to have cancelled.

The defendant, the city of New Orleans, through her counsel, denies that plaintiff is the owner of the property, and sets up the validity of her title, and in the alternative prays (should the court annul the adjudication) that the property be decreed liable for the tax. The sheriff by whom the property was sold under the provisions of Act 155 of the legislative session of 1894, was brought in as a nominal party to the suit.

Plaintiff's vendor had acquired title in 1880. In the deed by Mrs. Calmes, Widow Black (bearing date 21st May, 1884) to the plaintiff, the latter assumed the payment of the taxes for 1884. The assessment under the Act 96 of 1882, was completed on the 1st day of June, 1884.

The tax collector's certificate admitted in evidence, shows that from 1881 to 1884 the property was assessed in the name of Widow C. Black. In the delinquent list, filed in the mortgage office, the name of the owner is inserted as Mrs. Cornelius Black. The same error appears in the list of the comptroller.

The notice that issued prior to the seizure was addressed to Mrs. Cornelius Black and to the plaintiff.

In the assessment roll the lots are described as parts of lots 3 and 4, while the correct description is as before mentioned.

The only evidence offered by the defendant, the city of New Orleans, is the notice to the tax payer to come forward and pay, with the endorsement thereon, signed by a service clerk, dated November 22, 1888, making return that he had personally served the notice on the plaintiff.

The latter testified that he had no recollection of such a service.

WITH REFERENCE TO THE TITLE IN QUESTION OF THE DEFENDANT CITY.

Under Act 155 of 1894 the city of New Orleans is authorized to offer for sale, by public auction, after the required delays and formalities, all immovable property it owns under adjudication for the taxes of 1880 and subsequent years. The property having been thus adjudicated in 1891, it was this sale that the plaintiff enjoined upon the grounds before stated.

With the exception to the notice to the tax debtor, to which we have already referred, the city has not offered any evidence of title whatever.

The evidence introduced by the plaintiff does not prove that a valid sale has been made.

Without some testimony showing that a valid sale has been made, this court is without authority to determine that title to the property has passed under the revenue law of 1882.

There are formalities, essential in their character, that must be shown in order to sustain title to property adjudicated at tax sale.

The defendant here was not relieved from the necessity of offering some proof of title.

Plaintiff's right to an order to the proper officer to cancel the recorded lien and privilege is the issue arising at this time. It is settled by a number of decisions that the tax lien and privilege is prescriptible. In the Succession of Stewart, 41 An. 127, the point was decided, and it has been since affirmed and reaffirmed.

The prescription pleaded is a bar to the lien and privilege. Succession of C. E. Girardey; Opposition of City of New Orleans, 44 An. 543.

The defendant, through counsel urges, if the sale be decreed null, that her rights be reserved to be passed upon in another action.

 Logan et al. vs. Woodlief.

Our conclusion at this point of the case, requires in its support a review of the grounds of estoppel, pleaded by the plaintiff.

It was sought by the plaintiff to apply the principle announced in several decisions that the payment of part of the taxes on an assessment estopped the taxpayer from contesting the correctness of the assessment. In the cases cited there was no question as to who paid the tax. Here there is. It was not proposed to sell whole lots on an assessment of part of lots. The assessment in the case at bar was of part of lots 3 and 4.

The proposed sale was of lots 3 and 4.

It would serve no purpose to reserve right to sue, it being manifest that none exists.

Only part of lots having been assessed, it follows that the sale of an entire lot, under such an assessment, is null.

Moreover, there is confusion regarding the name of the owner. Mrs. Cornelia Black was not the name of the taxpayer. It was, at times, treated as if owned under that name.

The judgment is affirmed.

No. 11,759.

GEORGE C. LOGAN ET AL. VS. R. Y. WOODLIEF.

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51 1949

The Post Office Department, whenever a subcontractor for conveyance of the mails abandons his contract, may employ temporary service on the route.

Upon the return of the contractor, from whom the subcontractor held, that department, may reinstate the contractor.

Without the consent of that department, the subcontractor can not be reinstated by the contractor.

The general government has control of all contracts and subcontracts; they are governed by special regulations, and the laws applying to other contracts, regarding the placing in default, do not apply to these government contracts.

The subcontractor had no absolute right to reinstatement by an agreement with the one in charge of the temporary service to carry the mail.

The subcontractor having abandoned his contract, although he subsequently returned to the service prior to notice to the contractor of his abandonment, he could not continue in the service, even with the consent of the contractor, without the approval of the Post Office Department.

APPPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

W. B. Sommerville for Plaintiffs and Appellants:

On the breach of any obligation to do or not to do, the obligee may require the dissolution of the contract. C. C. 1926.

It is not a breach of contract for a sub-contractor for carrying mail to temporarily cease serving under the contract, because the acts of Congress provide that "the Postmaster General may employ temporary service * * * to continue until the contractor commences or resumes the proper performance of service, or until the route can be relet. * * * Such service can be continued only until the contractor in person or by agent appear and takes charge of the route." Postal laws and regulations, Secs. 771 and 772; U. S. R. S. 3954, as amended by Act of August 11, 1876, 19 Stats. 130; Act of August 3, 1883, Sec. 2, 22 Stats. 216.

If the promisor withdraw the notice of his intention not to perform before the promisee has elected to treat it as a breach, the latter loses his right to treat the contract as broken, and the parties are in the same position that they would have been in if the notice had never been given. Am. and Eng. Ency. of Law, p. 906, Vol. 3; 6 Toullier, No. 255; Moreau vs. Chauvin, 18 Rob. 161; Pratt vs. Craft, 20 An. 292; C. C. 1901.

Rice & Montgomery for defendant and appellee:

If parties, with knowledge of the fact that nullities, not absolute, exist in a contract, continue in its voluntary execution, they thereby waive such nullities, and are estopped from pleading the same thereafter in avoidance.

The abandonment of service, even for a day, gives the employer the right to dispense with the employee's further service. *Sherburne vs. Orleans Cotton Press*, 12 La. 360-1; *Ford vs. Danks*, 16 An. 119-20.

The Post Office Department alone could, under the circumstances of this case, have objected to the irregularities, if any there were, in the contract in question. *Bank vs. Flathers*, 45 An. 80; *National Bank vs. Whitney*, 103 U. S. 103.

Argued and submitted, May 6, 1895.

Opinion handed down, May 20, 1895.

Rehearing refused, June 24, 1895.

Logan et al. vs. Woodlief.

The opinion of the court was delivered by

BREAUX, J. Plaintiff, a subcontractor for carrying the mails of the United States, sues the defendant, the original contractor for the annulment of the contract and for judgment sounding in damages.

The defendant's contract, dated from January, 1890; and was entered into with the government for the term of four years to transfer in wagons the mails in New Orleans, between the post office and the railroad depots.

Subsequently, under the authority of an Act of Congress of May 17, 1878, the defendant entered into a subcontract with the plaintiff to perform the duties of the former under the contract, and under the subcontract the plaintiff entered upon the discharge of his duties in July, 1890.

In June, 1891, he wrote to the Post Office Department that it was impossible for him to continue the services required of him.

The following is a copy of his letter:

June 30, 1891.

"Hon. S. Eaton, New Orleans, La.:

"DEAR SIR—The company which has been hauling the mail under my subcontract has gone into liquidation, and the losses I have sustained in trying to continue the hauling for the past six weeks, rendering it impossible for me to continue any longer, I am compelled to discontinue from this day."

The department, whenever a contractor for postal service fails to continue in the performance of the service, may employ temporary service on the route; the cost of which is charged to the contractor until the contractor resumes the proper performance of service, or until the route can be relet.

The plaintiff under his contract was subject to all the requirements of the original contractor.

In consequence of the discontinuance of the subcontractor under his subcontract, the Post Office Department made a temporary contract with James Rainey, who took charge of the transfer of the mail, on the morning following the day that plaintiff discontinued carrying the mail.

In July the defendant notified the department that he had been informed of plaintiff's abandonment of his subcontract and that he would immediately resume service for his own account.

Later, the Postmaster General permitted the defendant to resume

service under the original contract, *i. e.*, the contract between the defendant and the government.

On September 1, 1891, the plaintiff acknowledged having received notice from the department of a fine imposed, and that money due him would be withheld.

He states in his communication to the officers of the Post Office Department that he resumes service under his contract, as he believes that he can thereby work out of the difficulties occasioned by his abandonment.

With the consent of Rainey (the temporary employee), he took charge of the wagons the former was using, and resumed, on that day, the hauling of the mail.

On the 14th of September, 1891, the postmaster here was informed of the action of the Post Office Department authorizing the defendant to resume service, and on that day began carrying the mail.

The plaintiff complains that on the day following he was dispossessed by the defendant and prevented by him from continuing the service under the subcontract.

From a judgment rejecting his demand, plaintiff appeals.

All the mail contractors and subcontractors are employees of the government.

There is no subcontractor without the consent of the proper officer of the Post Office Department.

He is under the orders of that department, and paid by the government for his service. He is subject to fines for the non-performance of duty, and for the causes assigned in the statute his service may be discontinued.

These contracts to carry the mails are public contracts, and contain the terms that the statute prescribes as binding contractors and subcontractors.

The plaintiff abandoned his contract and had been replaced by competent authority, for cause deemed sufficient by the Post Office Department.

He was not dispossessed by the defendant. The dispossession was an act of the authorized officer of the government, who under the statute made arrangement for the transfer of the mail.

Contractors and subcontractors are the agents upon whom the government relies for carrying the mails. They are, in many respects, public agents. *Conwell vs. Voorhees*, 13 Ohio, 523.

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Here the plaintiff was not truly a subcontractor or subagent in the sense that he was to serve the contractor exclusively, or carry out the mandate imposed upon him by the subcontract for account of this contractor only. But he was virtually under contract with the government, and one of its agents in the mail department, subject to its management and control.

Regarding the agency, Addison, in his works on Contracts, Vol. 1, p. 469, treats as settled that the subagent is responsible to the principal for whom he directly acts.

In the matter of performance of a contract, the principal, where the subcontractor assumes all the duties of the contractor with express consent and under the terms of the law, as in this case, applies.

The contractor was a mere intermediary, to whom the plaintiff did not give any notice of his abandonment of the contract. Under the terms of his contract the plaintiff sent his notice of abandonment properly to the chief of the Post Office Department, who at once acted upon plaintiff's default.

The *aggregatio mentium* between the parties concerned was complete without the original contractor's consent. His objection or consent, under the terms of the contract, would have been useless, as there was no place for the one or the other.

The Post Office Department consented to the reinstatement of the original contractor. We do not think it possible to conclude, from the facts of record, that the department consented to the renewal of the subcontract, and without that consent it was not left for the plaintiff to resume service under the contract abandoned by him. The contract was a public contract to which the Federal law was applicable. The plaintiff seeks to limit the contract to himself and the defendant.

This is not possible under the terms of the subcontract, and in view of the duty the plaintiff undertook to perform.

The carrying of the mails is an attribute of sovereignty surrendered by the States to the general government, and subject to its law and regulations adopted to secure "celerity, certainty and security."

There is no lack of legitimate power in the general government to assume, as it has control of all the contracts and sub-contracts for carrying the mails. It has the power, after abandonment by the

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subcontractor, to reinstate the original contractor, without permitting the subcontractor to resume service under the subcontract.

It is ordered, adjudged and decreed that the judgment appealed from is affirmed at appellant's costs.

No. 11,630.

GEORGE DIXON VS. LOUISIANA ELECTRIC LIGHT AND POWER COMPANY.

A night inspector of the defendant company undertook to repair a lamp out of order, the cut-off screw of which had been burnt out. It was highly dangerous (the volts on the wires were 3000) to handle the lamp while standing on the ground, and equally dangerous to handle it while standing on a wet insulating board or stool. After the accident the deceased was found lying on the ground in the gutter, north from the lamp. The lamp had been lowered to about three feet from the ground. The hood of the lamp had been taken off and placed a short distance from the lamp. The insulating board was south of the lamp, so that the lamp was between the insulating board and the body. The cut-off screw, out of repair, was on the side of the lamp the body was found. A fall backward from the insulating board would have been in a direction opposite from that his body was found. A fall forward would have been obstructed by the lamp in his front, and would have thrown him obliquely to the right or to his left. The position of his body gives rise to the inference that he was standing on the ground on the side of the lamp, opposite to the insulating stool; that he was standing on the ground the side the hood was and the cut-off screw. If this be not correct, and he was at the time standing on the insulating stool; it was not shown that there was any electrical defect in the insulating stool. It was incumbent upon him not to use a wet insulating board, if it was wet. It is the obligation of the servant to use ordinary care to prevent and avoid injuries. It is his duty to go about his work with his eyes open. He must take ordinary care to learn the dangers which are likely to beset him in the service. He was warned of the danger. The action against the employer is barred by the imprudent acts of the victim of the accident.

APPEAL from the Civil District Court for the Parish of Orleans.
King, J.

B. R. Forman and B. R. Forman, Jr., for plaintiff, appellant, cite: Beach on Contributory Negligence, 370; Wood, pp. 763, 681; Thompson on Negligence, p. 975; 41 An. 967; 40 An. 183.

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Farrar, Jonas & Kruttschnitt for defendant, appellee.

Argued and submitted, March 13, 1895.

Opinion handed down, March 25, 1895.

Rehearing refused, June 24, 1895.

The opinion of the court was delivered by

BREAUX, J. The plaintiff claims damages for the alleged killing of his son, James Dixon.

The decedent was a night inspector, and had charge of a district or route, and his duty was to repair lamps at lighting points and inspect electric lights.

It devolved upon him during the night to telephone to the clerk at the plant and receive or convey information about the electric current and the arc lights.

On the night of the accident the last telephone message received from James Dixon was at 3:05 A. M. He was at the time a considerable distance from the place of the accident, at the corner of Broadway and Felicia streets, where his body was found on the morning of July 17, 1889. He was lying on his back in a gutter on the north side of Broadway street.

The arc lamp had been lowered to within a few feet of the ground, the hood of the lamp taken off and placed a short distance in the street. There was an insulating stool or board, used to stand on while repairing a lamp, which had been evidently placed there by the late James Dixon, and on which, in all probability, he stood part of the time at least. He was at work endeavoring to repair the lamp from a position not under the lamp, as testified by some of the witnesses, but on the side nearly under the lamp. The body when found was in an opposite direction; that is, the lamp was between the body and the insulating board.

We are clearly of the opinion that the death was caused by an electric shock.

The cut-off screw on the side opposite to that near which the insulating board was standing was out of order; it was burnt out. This cut-off screw was on the side the body was lying, giving rise to the inference urged on the part of defendant, that Dixon must have taken the hood off, placed it on the ground, and commenced to work

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on the screw from the ground, without standing on the insulating plaintiff's board.

Plaintiff's counsel controvert this inference, and urge that Dixon might have received the fatal shock before discovering that the cut-off screw was out of order, or that there is probability that he unscrewed the hood and pitched it along the ground without getting off his board, and went on with his work; that the lamp was a swinging lamp, and if the cut-off screw was on the other side of the lamp from the insulating board, Dixon might have swung the lamp around so as to get at the cut-off screw; or he might have been adjusting another part of the lamp.

These grounds urged by the plaintiff, are not sustained by the testimony.

Only one witness, a little girl eleven years of age, testified that she was present and witnessed the accident. She was carrying milk from her father's house to a neighbor.

The District Judge says: "No one saw the deceased when he was killed. There is no proof as to whether he was standing on the stool or on the ground when he met his death.

"Circumstantial evidence leads the court to the conclusion that the deceased was standing on the ground at the time, attempting to repair a defective lamp.

"One witness, a girl, at the time of the accident twelve or thirteen years old, testified, three and a half years after, that she saw the deceased at the time he was killed, and that he was standing on the stool, with his hands above his head, fixing the lamp.

"The jury evidently did not credit her story. The court attributes her testimony, among other reasons, to her childish imagination, and considers she related not what she did see, but what she imagined she had seen."

The witness testified in the presence of the District Judge and the jury.

Under the jurisprudence well settled on that subject, and in view of the facts, we must give weight to the opinion expressed by the District Judge. Moreover, the record does not disclose that her testimony was uncontradicted and consistent. With reference to the time he was killed, this plaintiff's witness would fix it after sunrise, while the defendants' witnesses testify that there was no current on the lines after daylight.

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Her testimony regarding the height of the lamp from the ground does not agree with the testimony of other witnesses. The account given of the fall at the time of the fatal shock is not, we must say, convincing.

We have given due consideration to her testimony. The view we have taken of it is not in the least unfavorable to the witness.

She was a mere child at the time, and her statement many years after the death as a witness, can not under the circumstances be taken as a basis for a judgment.

Other evidence discloses that it was not possible for James Dixon to stand on the insulating board, as before described, and receive a fatal electric shock, judging from the position his body was found. Scientific experts in electricity testified that in wet weather the insulating stool was not safe to be put down anywhere in the street so that a man could safely handle and operate wire at a line or point not properly insulated, carrying three thousand volts.

The record discloses that no rain fell between July 14 and 17, 1889.

The preponderance of the testimony shows that the insulating board was in good condition, and not sufficiently wet to convey current enough to the top of the board to give anybody a dangerous shock.

It is in evidence that Dixon understood the danger attending the work of a night inspector; that he was warned of that danger; that he had charge of the insulating board, and that it devolved upon him to place it in a safe position. It is well settled that the servant assumes the risk if he knows the danger of his employment. Bailey, *Master's Liability and Injuries to Servant*, p. 146.

One of plaintiff's charges was that the current of electricity over and through defendant's wires was of such intensity and volume as to be dangerous to human life.

The evidence is that the voltage of the circuit was about three thousand, and that there were between eighty and ninety lamps on the circuit, and that it is not practical to use a short circuit and low voltages. It is not done anywhere, and is not considered good electrical engineering.

We do not discover here that there was anything exceptional in the number of lamps put upon the arc light circuit using a direct current, or in the tension of the current.

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The board to stand on was such as is ordinarily used, and is still in use.

If Dixon was standing on the ground, or if he was not careful in the use of the insulating board, his sad fate and untimely end are not causes of action for which the defendant can be held.

The case was tried the first time before a jury. They having failed to agree, the prayer for trial by jury was withdrawn, and the case was decided by the court without the intervention of a jury.

Plaintiff's demand was rejected. He appealed.

It is ordered, adjudged and decreed that the judgment appealed from is affirmed at appellant's costs.

No. 11,596.

JEAN M. BEGUE VS. MRS. E. A. ST. MARC.

The borrower insured the property mortgaged to secure the debt and in the policy the clause was inserted: Loss, if any, payable "to the creditor" as interest may appear.

The policy was transferred to the possession of the creditor and he continuously, during five years, held possession.

Five years having elapsed since the maturity of the note; during which time the policy was renewed annually with the clause in question, the note in consequence is not prescribed.

Subsequent to the five years another policy containing a similar clause was taken out in lieu of the first.

The order annually given to pay the loss, if any, to the creditor, was an acknowledgment of the debt which had the effect of suspending prescription.

The possession by the creditor of the policy of insurance of the debtor, duly assigned by the latter to the former, and kept alive by payment of premium, is an acknowledgment.

The acknowledgment of a debt will interrupt prescription though such acknowledgment be not made to the creditor.

Watkins, J., dissenting.—The object and scope of the stipulation in an act of mortgage whereby the mortgagor agrees to keep the buildings and improvements, subject to the mortgage, insured, until the full and final payment of the mortgage, was to oblige the mortgagor to keep up the mortgaged property to its then standard value as a security for the debt; that in case of loss or damage by fire before the maturity of the note and its payment, the insurance policy would fully guarantee the mortgagee's reimbursement to that extent.

The assignment of an insurance policy to a mortgagee is, in no sense, a pledge for the security for the debt; nor is it a contract with the mortgagee only. It is simply intended as a protection of the security of mortgage and not for the payment of the debt.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

47	1151
111	872
411	878

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Albert Voorhies for Plaintiff, Appellee:

Prescription does not run as long as the creditor, with the consent of the debtor, holds the latter's valuables as collateral security, in pledge or otherwise. And the same is true of antechresis, and generally of all agreements by which a debtor confers possession of his property to his creditor with the stipulation that the rents and revenues are to be applied to the extinguishment of the debt.

The transfer of a policy of insurance and its delivery to a creditor as collateral security is a continuous acknowledgment of the debt. The stipulation in a policy of insurance "loss, if any, payable to the creditor," is a formal acknowledgment of the debt.

Partial payments made by the husband as agent of his wife is an interruption of prescription.

As long as the policy is operative between the mortgagor and the insurance company, the pledge in the hands of the mortgage creditor remains in full force; and as long as the latter holds the pledge "there is a standing acknowledgment of the debt," and as a consequence prescription does not run. C. C., Art. 3520 (3486).

Elliott vs. Brown, Executor, 18 An. 579, is an able exposition of the law of admission. The court observes: "There must be an acknowledgment of the creditor's right. C. C. 3486. An admission by the alleged debtor that a third person holds a note against him is not, of itself, an admission that he justly owes to such person the amount of the note."

The distinction is an obvious one. In the preceding paragraph the witness, it appears, said "that he has heard George Elliott say, within the last five years, that Bryce Elliott held a note against him, but did not acknowledge that he owed the note, or state the amount; but, on the contrary, stated that Bryce Elliott was largely indebted to him."

Civil Code, Art. 3520 (3486): "Prescription ceases likewise to run whenever the debtor, or possessor, makes acknowledgment of the right of the person whose title he prescribes." It is the right that must be acknowledged. That is what is decided in the case, *Schultz vs. Houghton*, 36 An. 407. Said the court: "It is perfectly clear that defendant in this case has never acknowledged the right of the creditor—i. e., the debt claimed

by the creditor; but, on the contrary, declined to acknowledge it, and left it a matter of free and open discussion.”

Thos. J. Semmes and A. B. Phillips for Appellant:

The assignment of a policy of insurance to a mortgagee as interest may appear, does not suspend prescription as does a pledge for a debt. 115 Mass. 590; 75 New York, 10; 18 An. 579; 86 An. 407.

The policy in this case was made in 1880, and the assignment to the mortgagee was contemporaneous with the mortgage, 8th August, 1884. It was kept in force until 1893 by payment of premiums—who made those payments is not known—that is, whether they were made by the husband or the wife; but whether made by one or the other, they were not payments on account of the debt secured by mortgage, and therefore are not annual interruptions of prescription. Those payments were made on account of a contract collateral to the debt and the mortgage securing it, but not on account of the debt or the mortgage, for they in no manner diminished the debt or reduced the mortgage.

The object of those payments was to maintain intact the thing which had been mortgaged to secure the debt. If that thing were destroyed the debt secured by it would remain in full and undiminished vigor, but the thing pledged to secure its payment would disappear. It is therefore plain that the object of the collateral contract is, not to secure the payment of the debt, but to preserve the thing which is pledged to secure the payment of the debt. The thing may be a house mortgaged or a chattel pledged—the collateral agreement is to secure the rebuilding of the house or the replacement of the chattel in case of destruction or loss—and that agreement to rebuild or replace is made with a third person, who contracts with the debtor to rebuild the house if destroyed, or replace the chattel if it perish. Does it not follow that the assignee of such a contract is not in possession of the thing pledged to secure the debt, though he may be in possession of an agreement on the part of a third person to replace the thing pledged.

It is plain, therefore, that the possession of the agreement to replace the thing pledged is not the possession of the thing pledged, but

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of another thing, which is not the object of the contract of pledge, but the object of a contract collateral thereto.

It is the possession of the thing pledged which prevents the running of prescription, the creditor being in possession has no interest to sue; the pledge is his guarantee, and the debtor by leaving the pledge in his hands recognizes the existence of his debt.

Such is not the case with a mortgage, because the mortgagee has no possession; but such is the case with antichresis, because the antichresis creditor has possession of the immovable, which is the object of the antichresis contract.

In its origin the *pignus* conferred on the creditor the right of retention only, and for that reason to-day possession is essential to a pledge.

The Supreme Court of Massachusetts say, in the case of Gordon vs. Savings Bank, 115 Mass. 591: "The issuance was for indemnity, to the mortgagee as well as to the mortgagor. To the mortgagee it was protection of the security, not for the payment of the debt."

Now, what is the essence of a pledge? The Code, in Art. 3183, defines a pledge to be "a contract by which one gives something to his creditor as a security for his debt;" not a security that the thing pledged shall not perish.

An independent contract by a third person that the thing shall not perish, or if it does it shall be replaced, is certainly no part of of the contract of pledge; it is a distinct and independent agreement, not made by the debtor, but by a third person no party to the contract of pledge, and having no interest whatever in the debt, nor in the thing given to secure its payment.

The contract of insurance might have been made with the mortgagee only, to indemnify him against loss in case the mortgaged property should be destroyed.

Does it make any difference in the nature of the transaction that the insurance is effected in the name and at the expense of the mortgagor? In both cases the nature of the contract is the same; it is an agreement for the preservation of the security, not for the payment of the debt. In the one case the mortgagee insures his qualified right in the property; in the other the mortgagor insures as absolute owner, but, as said, the nature of the contract, for the preservation of the thing, is the same in both cases.

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What is the reason that the possession of the pledgee is considered a continual tacit admission of the debt due to him?

The possession of the creditor is precarious; by no lapse of time can he acquire title to the thing pledged. The possession being precarious, its continuance is an admission by the owner that the possessor has some right that entitles him to possession, otherwise he would resume the enjoyment of his property. This has no application to a collateral agreement having for its object the preservation of the thing which is in the possession of another, and which in no manner relates to the title or possession of the thing possessed.

Argued and submitted March 1, 1895.

Opinion handed down May 6, 1895.

Rehearing refused June 21, 1895.

Plaintiff is the holder of a promissory note.

Against the maker's plea of prescription he invokes the payments made by defendant's husband, endorsed on the note and signed by him. He represented himself at the time as his wife's agent.

The following is the testimony upon the subject:

Q. Please state in what capacity Mr. Ferrandou appeared and made these payments and signed those documents.

To which question Mr. Philips in behalf of Mrs. Ferrandou objected unless counsel can show written authority from Mrs. Ferrandou to endorse these papers.

The court rules that the objection goes to the effect, but that the plaintiff must prove express authority either by parol or in writing. The defendant in rebuttal, on this point, testified that her husband was not authorized to make the payments of interest he had made, nor to sign endorsement on the note showing payments.

Regarding the policy of insurance invoked by plaintiff against the plea of prescription, being plaintiff urged an acknowledgment of the debt; the transfer by defendant to plaintiff reads:

"NEW ORLEANS, La., August 6, 1884.

"For value received I hereby transfer, assign and set over all my rights, title and interest in and to the within policy of insurance

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unto and in favor of Jean Marie Begue as his interest may appear.

(Singed)

"E. A. FERRANDOU.

"To authorize my wife.

A. FERRANDOU."

The policy was in force at all times, and plaintiff's claim referred to as insured.

Mrs. E. A. Ferrandou annually paid the premiums to the insurance company, to the 17th June, 1893, at which time, desiring to increase the amount of the insurance, she ordered and obtained another policy in which the following was inserted as it had been in the first policy.

"Loss, if any, payable to Jean Marie Begue as interest may appear."

This new policy in plaintiff's possession was by him introduced in evidence.

With reference to the policies the defendant, Mrs. Ferrandou, testified:

Q. That is your signature to the transfer of the insurance policy to Mr. Begue?

A. Yes; that is my signature.

Q. And you were insured in the Home Insurance Company?

A. Yes.

Q. That renewal was made by you afterward, in 1893?

A. No. I went and got another policy, because I wanted to have the policy for more and pay less premium.

Q. That is the reason why you increased the policy from \$5000 to \$5500?

A. Yes

Q. But that is your policy of insurance?

A. Yes; they told me they would send it to me.

Q. But they never sent it to you?

A. No; I never received it.

Q. But you paid for it?

A. Yes, I paid for it, but they never sent it.

It is in proof that she paid for the first and second policies, each carrying plaintiff's claims as an interest insured.

As to the second or new policy, although paid for by her it was not delivered to her.

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Plaintiff urges that she could not thus annually retain her policy in force and order in event of loss by fire, payments to him without acknowledging the validity and binding effect of her indebtedness to him.

The opinion of the court was delivered by

BREAUX, J. The defendant, the maker of a promissory note, secured by mortgage, alleges that it is prescribed. More than five years had elapsed from its maturity on the day that service of citation and petition was made.

But at the same time that the defendant gave the mortgage, she assigned a policy of insurance to the mortgagee, in writing, with the authority of her husband, in compliance with the usual clause of the mortgage act covering such assignment.

This was on the 6th day of August, 1884.

Payment of small amounts of interest was made from time to time, including a payment made of interest on August 6, 1892, at which date payment of the note was extended one year.

With reference to the payment of this interest and extension of payment of the note, the defendant alleges that her husband, who made the payment and obtained an extension, was without authority to represent her and to sign the endorsement written on her note.

On the 14th day of June, 1893, the policy was renewed. This policy, different from what it was with the first policy, was not assigned to the plaintiff on the books of the company, but it contains the provision: "Loss, if any, payable to Jean Marie Begue, as interest may appear."

The defendant paid for this policy of renewal. It was not sent to her, although the officer at the insurance office had promised to send it to her.

The judgment was pronounced against the defendant. She has taken this appeal.

We will not stop to discuss the question of the assignment of a policy of insurance to a mortgage creditor, and whether or not it should, while in the creditor's possession, be considered as a pledge, which suspends prescriptions on the note secured by mortgage. But the payment annually by the debtor of premiums to keep the policy alive was, in our opinion, of itself an acknowledgement. The pur-

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pose seems to have been an acknowledgment. The contract of insurance was in possession of the mortgagee. It contained evidence of an agreement that gives rise to one inference only—an indebtedness of the insured to the mortgagee.

Every year that agreement was renewed by renewing the policy. It gave strength and effect to the policy which the creditor held. This annual renewal is inconsistent with the absence of liability.

Insurance is for the mortgagor's indemnity, as well as the mortgagee.

In securing the latter, it does seem to include an acknowledgment.

It was sufficiently fixed to operate as an acknowledgment by the order, in event of loss, to pay to the mortgagee the amount remaining due on his mortgage.

If the property insured had been destroyed by fire the sixth year after the maturity of the note, and while the policy in the hands of the creditor was kept in full force by payment by the debtor of the premium and the renewal of the policy by the company, the standing order that year to pay the losses of the insured should have had full force.

The direction to the company was absolute in terms.

It was a continuing, standing order to pay to the creditor the amount due him.

When a claim is not prescribed the insurance company can not ignore the provision made for the mortgagee's protection and violate the policy to the detriment of his interest.

An agreement securing such a right is surely an acknowledgment of the debt.

Moreover, the policy was owned by the defendant. She, by the payment of premiums annually, gave it value in the hands of the creditor.

The possession of this policy, kept alive by the debtor "prevented prescription from running in the same manner as in the case of a pledge, prescription does not run as long as the thing pledged remains in the possession of the pledgee." *Montgomery vs. Levistones*, 8 Rob. 145.

It is true that the acknowledgment was not made directly to the debtor, but it is really as complete as if annually the debtor had handed to his creditor an amount to be applied to the insurance of his property and the greater security of his claim.

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It is ordered, adjudged and decreed that the judgment appealed from be affirmed at appellant's costs.

DISSENTING OPINION.

WATKINS, J. Executory proceedings were commenced against Mrs. E. A. St. Marc, a married woman, to foreclose a conventional mortgage on her paraphernal property, under her administration, which she had consented to on the 6th of August, 1884, as a security to the plaintiff for the loan of money—she being judicially separate in property from her husband, and the judge of the proper jurisdiction having authorized her to borrow the money.

The maker and mortgagor appeared and enjoined the seizure and sale of her property on the ground that the note and the debt it evidenced had become extinguished by the prescription of five years, and the prayer of her petition, duly sworn to, is that proceedings be perpetually restrained and the note and mortgage be cancelled and annulled.

In answer, the plaintiff, in executory proceedings, alleges that the mortgagor is indebted to him as stated in his petition, and his prayer is that her demand be rejected.

The only question we have to consider is that of prescription.

It is true that there are endorsements on the back of the note which indicate the annual extension of time for the payment of the note; but these are neither signed by the defendant, nor were they authorized by her, and do not, consequently, have the effect of interrupting the current of prescription.

The creditor, however, relies upon the mortgagor's assignment to him of an insurance policy, covering the buildings on the mortgaged premises, as having effect as a pledge to interrupt prescription.

The policy bears date June 16, 1880, and the amount of insurance is \$7000. By successive renewals this policy was kept and continued in force up to and including the 17th of June, 1885.

The loan was effected and the note and mortgage were executed on the 6th of August, 1884, and in the act of mortgage is found the following stipulation, viz.:

"And the said mortgagor * * * further declares that she does, by these presents, bind and obligate herself and her heirs to cause all and singular the buildings and improvements on the property aforescribed, to be insured and kept insured against the risk

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of fire, up to their full value, until the full and final payment of said aforesaid promissory note, and to transfer and deliver unto the said mortgagee the policy of insurance," etc.

In keeping with that stipulation, the mortgagor placed upon the insurance policy the following endorsement, viz. ;

NEW ORLEANS, LA., August 6, 1884."

"For value received I hereby transfer, assign and set over, all my rights, title and interest in and to the within policy of insurance unto and in favor of Jean Marie Begue, as his interest may appear.

"(Signed)

E. A. FERRANDOU.

"To authorize my wife. A. FERRANDOU."

Subsequently, this policy was annually renewed until the 19th of June, 1898, when it was surrendered, and a new one was issued in favor of the defendant and mortgagor.

In this policy is found the recital, viz. : "Loss, if any, payable to Jean Marie Begue, as (his) interest may appear."

The foregoing is all the evidence which the record affords in reference to the alleged pledge of the policy of insurance to the plaintiff, mortgagee and payee of the note in suit.

In my opinion, it fails to establish the relations of pledgor and pledgee.

The whole question turns upon the act of mortgage, a stipulation of which obligated the mortgagor to keep the buildings and improvements on the property mortgaged insured up to their full value against loss or damage by fire, until the full and final payment of the mortgage note, and to transfer and deliver unto the mortgagee the policy of insurance.

The evident object and scope of that stipulation was to oblige the mortgagor to keep up the mortgaged property to its *then standard of value* as a security for the debt; so, that in case of loss or damage by fire, before the maturity of the note, and its payment, or the foreclosure of the mortgage, the insurance policy would fully guarantee the mortgagee's reimbursement to that extent.

It is equally manifest, that, in the event no loss or damage should occur by fire, prior to payment of the note, the insurance policy gave *no additional value to the property* as a security for the mortgage indebtedness.

The assignment is contemporaneous in date with the execution of

the note and mortgage, and constitutes a component part of the same transaction. The covenant in the act of mortgage is, that the maker and mortgagor should *transfer* and deliver to the mortgagee the policy of insurance; and the language of the assignment is, "for value received I hereby *transfer, assign and set over* all my rights, title and interest in and to the within policy of insurance," etc.

This is the phraseology of an act of *sale*, and not that of a *pledge*. It evidences an intention on the part of the mortgagor, to simply carry into effect the covenant of the act of mortgage, to *transfer and assign* to the mortgagee the *insurable value* of the buildings on the mortgaged property, so as to put it in his power to save himself, in case of loss or damage thereto by fire, during such a period of time as the note should remain unpaid. Such is the clear import of the words of the assignment, viz.:

"In favor of Jean Marie Begue, as *his interest may appear*."

And it is likewise the clear import of the condition of the renewal policy, viz.:

"Loss, if any, payable to Jean Marie Begue, as *interest may appear*."

In the argument of the counsel for the creditor some stress is placed upon this last stipulation, and he points to it as complete evidence of the debtor's acknowledgement of the creditor's right, which interrupts prescription. But the testimony fails to satisfactorily show that the debtor, a married woman, ever authorized its insertion in the policy; or that she was authorized to do so, either by her husband or the judge. The burden of proof is on the one seeking to hold a married woman bound upon a contract, to show by proof that her act was authorized, and that it enured to her benefit, and the evidence in the record falls short of this, in respect to the stipulation quoted from the renewal policy.

The only evidence in the record on this quotation is that of the officer of the insurance company, whose statement is, that it is a renewal of the policy of Mrs. Ferrandou, the defendant. That on coming in from lunch, he found the renewal on his desk and made out the policy accordingly. That the defendant was not present in the office at the time. That upon one occasion he saw Mr. and Mrs. Ferrandou at the office, but he did not know what transpired, as they spoke with the secretary.

The defendant, as a witness, states that she went to get another

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policy of insurance, because she wanted one for more money and to pay a smaller premium. That the officers of the company told her they would send it to her, but they never did.

This is all the evidence on the subject, and instead of it making proof of her knowledge or concurrence in the *recitals* of the renewal policy, it exhibits her utter ignorance of them. That she was neither consulted nor advised in regard to its confection.

It is therefore but reasonable to infer from the evidence that the officer of the insurance company, who caused same to be drawn, simply gave directions that the policy in renewal of the insurance should follow the phraseology of the policy which was surrendered to the company.

Hence it possesses just the same significance as the original policy and no more.

To have effect as a pledge, the thing given to the creditor must be given *as a security for his debt*. R. C. O. 3183.

And it has often been held by this court, that "no prescription runs as long as there is *property pledged for the payment of the debt*, such pledge being a standing acknowledgment of the debt." *Vide Wilson vs. Bannen*, 1 R. 556.

It was held in *Montgomery vs. Levistones*, 8 R. 145, that "the creditor's *possession* of the debtor's property with the latter's consent, *to pay himself out of the rents*, is an acknowledgment of the debt interrupting prescription."

To the same effect is *Scovell vs. Gill*, 30 An. 1207. The theory entertained by the court was that "it prevented prescription from running in the same manner as in case of pledge, (and) prescription does not run so long as the thing pledged remains in the hands of the pledgee." *Ibid*.

And in *Wilson vs. Bannen* it was said that "as long as the 105 kegs of nails remained in the hands of the owners of the ship as a pledge for the payment of the freight no prescription could run, because the pledge was a standing acknowledgement of indebtedness on the part of the defendant."

In *Citizens Bank vs. Hyams*, 42 An. 729, we said:

"The possession of the pledge was a constant recognition of the debt, which prevented prescription from ever beginning to run. It is *not the contract, nor the act of pledge*, that interrupts prescription; but it is the *detention of the thing pledged*. Such possession is a con-

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stant renunciation of prescription every instant that it begins to run." See, also, *Conger vs. New Orleans*, 32 An. 1253; *Latiolais vs. Citizens Bank*, 33 An. 1452; *Lackey vs. Macmurdo*, 9 An. 18; *Citizens Bank vs. Knapp*, 22 An. 117; *Citizens Bank vs. Johnson & Bogan*, 21 An. 128; *Police Jury of West Baton Rouge vs. Duralde*, 22 An. 107; *Blanc vs. Hertzog*, 23 An. 199.

From all of these decisions we find the essential thing to be a pledge of something by the debtor to his creditor as a *security for his debt*, and it is the creditor's *possession* of the thing that is thus pledged that is regarded as the standing acknowledgment of the debt, which interrupts and keeps suspended the current of prescription.

While it is true that, as in the case of a Citizens Bank mortgage, the pledge of certificates of stock delivered to the bank, at the inception of the contract, is a pledge which interrupts prescription of the mortgage indebtedness, they are given that effect because they possess in themselves an *additional value entirely independent of the security of the mortgage*. But it does not follow that the assignment of an insurance policy on the mortgaged premises is such an *additional security for the debt*, though it be contemporaneously assigned to the mortgagee, and therefore it can not be given effect as a pledge. Indeed, if such an assignment of a policy of insurance (as the interest of the mortgagee may appear in case of loss), is a pledge which suspends the prescription of the mortgage indebtedness, then mortgage notes become practically imprescriptible.

This surely is not the case.

But the assignment of an insurance policy to a mortgagee is, in no sense, a pledge for the security of the debt. Nor is it a contract with the mortgagee only. It is simply intended as a protection of the security of mortgage, and not for the payment of the debt. This principle was maintained in *Illinois Insurance Company vs. Fix*, 58 Ill. 151, in which the court say:

"The interest that can be claimed for an assign in such case is that he should stand in the same position as if he had taken out a new and independent policy to protect his own interest as mortgagee."

The same distinction was taken in *Gordon vs. Savings Bank*, 115 Mass. 590, the court holding that the insurance policy was for the protection of *the security*, and not for *the payment of the debt*. It was

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collateral to the debt. Money received from the insurance company took the place of the property destroyed.

In that case the court further held, that in case of loss *the money could not be applied to the payment of the debt secured by the mortgage before it became due without the consent of the mortgagor*; and it is equally true that if the note should go to maturity before a loss by fire should occur, the mortgaged property could be seized and sold without any reference to the policy of insurance, the benefit of which would, of course, inure to the adjudicatee without any stipulation to that effect, the mortgagee's beneficial interest therein being extinguished by the sale of the mortgaged property.

Such is not the case of a pledge of additional property, as that of shares of stock of the Citizens' Bank, as a further security for the debt which is also secured by mortgage. Succession of Thompson, 46 An. 1075.

If the mortgage were permitted to perempt by a failure to reinscribe it within ten years, it would lose its grasp upon the property, and no longer be available as security to the creditor; and he would, at the same time, lose interest in the policy of insurance.

It has been repeatedly held, in other jurisdictions, that in case the insurance company should exercise the option of its contract and elect to rebuild, or repair the burned buildings, the policy ceases to be a contract of insurance and becomes a building contract between the insurer and the insured, with which a mortgagee has no interest or concern. *Henneman vs. Insurance Co.*, 75 N. Y. 10; *Morrill vs. Insurance Co.*, 33 N. Y. 429; *Beals vs. Home Insurance Co.*, 36 N. Y. 522.

The enunciation of this principle clearly shows that an insurance policy is not, in any sense, a pledge, because it may, after a loss by fire has occurred, be changed to a building contract, at the option of the insured and insurer, without the knowledge or consent of the mortgagee.

In my opinion, there is no hypothesis on which an insurance policy can be held to be a pledge in favor of a mortgagee to secure the payment of his debt.

But independently of that proposition, claim is made on behalf of the mortgagee that prescription of the debt was interrupted by the annual payment of premiums, thus keeping and maintaining the policy in force, such annual payments being acknowledgments of the

mortgage debt. Or, in other words, the payments of premiums was a constant admission of the *existence* of the debt.

But is that so?

It would seem but reasonable that the premiums should follow the conditions of the contract, and each payment of premiums evidences a *new* contract of insurance just like the original. Premium is the aliment on which insurance subsists, and it necessarily sustains like relation to the debts as the policy does. Hence, the payment of annual premiums carries no other significance than does the payment of the *first* one which is acknowledged in the face of the policy. Therefore, if I am right in holding that the assignment of an insurance policy has not the effect of a pledge interrupting prescription, for the same reason payments of annual premiums do not amount to an acknowledgment of the *debt* which interrupts prescription.

But the contract of insurance and the payment of premiums annually only evidenced relations between insurer and insured, and to which the mortgage creditor was neither party nor privy, the payments having been made to the insurance company, and not to the creditor, if made by the debtor at all.

Thus far, however, the argument has proceeded on the assumption that the defendant mortgagor made those payments in *propria persona*.

It must be borne in mind that the mortgagor is a married woman, judicially separate in property from her husband. That she executed the note and mortgage with the authorization of the judge of competent jurisdiction. But the evidence shows that the money borrowed was paid into the hands of the husband, and that he appeared annually at the bank where the note was deposited, in company with the mortgagee, and obtained extension of payment annually, and, in evidence thereof, the husband and mortgagee placed their signatures on the reverse of the note.

The evidence also shows that the defendant mortgagor never signed or acknowledged said extensions, and that in so doing her husband did not act as her agent. The note clerk of the bank being interrogated on the question said that he regarded the husband as an honorable man, and relied upon his action as being duly authorized, and when he inquired into the matter, he learned it was too late, the note having become prescribed.

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The defendant mortgagor testifies as a witness that the acts of the husband, in this respect, were not authorized by her, and that in so doing he was not her agent.

Hence, the reasonable inference is that the *husband used his own money* in paying what is termed "small interest," in order to obtain annual extensions of time for the payment of the principal of the note.

This much seems to be conceded on the other side, inasmuch as it is not insisted in the argument that either the endorsements on the notes or the the payment of "small interest" operates an interruption of prescription.

With regard to the payment of the annual premiums, there is no statement of any kind in the evidence, except that of one official of the insurance company, who said, in a general way, that all insurance premiums had "been all paid more or less regularly," without specifying by whom the premiums had been paid.

But, inasmuch as the husband received into his own hands the money which was loaned on the mortgage, and annually procured extensions of the note, with the consent of the mortgagee, on the payment of small interest, is it not reasonable that a like provision was made by and between them for the payment of the premiums on the policy which the mortgagee held in possession?

In this connection there is one statement made by the official of the insurance company which is quite significant. It is exhibited by the following interrogation, viz.:

Q. You attended to the making of the policy?

A. Yes.

Q. *Was that renewal by Mrs. E. A. Ferrandou?*

A. *It was a renewal of her policy, etc.*

The testimony further shows that the defendant was not present at the time, and knew nothing of its preparation. It also shows that the renewal policy was never sent to her at all, and that, in point of fact, she never saw it.

On the foregoing it can safely be affirmed that there is no proof in the record of the defendant having paid the insurance premiums, and that, consequently, their payment did not operate as an interruption of the prescription of the note.

As the sole question in this case is prescription *vel non*, can it be supposed that payments of the premiums by the wife would have

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been left to inference, or suffered to remain in doubt, if positive proof of the fact could have been made?

And, if in fact she had made the payments herself, or by her authorization, would it not have been quite an easy matter for the insurance company to have supplied the proof? Undoubtedly.

The Code provides that "prescription ceases to run whenever the debtor * * * makes acknowledgment of the right of the person whose title they prescribe." R. C. C. 3520.

Can it be correctly said that the defendant, a married woman, has "acknowledged the right" of the creditor, in view of the proof that is afforded by this record? Certainly not.

In such case the debtor's acknowledgment must be *clearly* shown; and in *Lackey vs. Macmurdo*, 9 An. 18, it was said that "an interruption of a prescription gives a new date to prescription; and as it affects the rights and obligations of the parties, *the debtor's assent to such a charge must be clearly shown.*" It is evident that the judgment appealed from is erroneous and ought to be reversed.

No. 11,766.

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On the charge of attempting, by persuasion, to prevent a witness from testifying on an investigation by a grand jury, it is not error that the State witness, in proving the persuasion, was permitted to testify over the objection of the accused, that in the conversation in which the persuasion was used the character of the grand jury proceeding was introduced by the accused, and, to some extent, discussed; that discussion being linked with the persuasion, so that the testimony objected to was requisite to show the nature of the persuasion and the motive of the accused in using it. 1 Greenleaf on Evidence, Secs. 51, 52.

On such charge the proof was relevant that when the persuasion was used the grand jury investigation in contemplation, was known to the accused; that he also knew the party sought to be persuaded not to testify was a material witness in that investigation, and the proof that the investigation resulted in indictments is also pertinent.

If, to make the persuasion effective, the accused made a false statement, as, for instance, he had been sent to request the witness not to testify, testimony of the falsehood part of the persuasion is admissible.

The instruction to the jury that under the State Constitution they are judges of the law and fact; they must ascertain the facts from the testimony, apply the law as given by the court, and that they can not rightfully disregard the instructions of the court on the law, affirms the weight due to the instruction; the moral obligation of the jury to respect the charge, and although "must"

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is used, the charge, as a whole, is in substantial accord with our jurisprudence. Constitution, Art. 168; State vs. Johnson, 30 An. 905; State vs. Ford, 37 An. 465; State vs. Cole, 38 An. 846.

The section of the Revised Statutes under which the accused was indicted punishes the attempt by persuasion, to prevent a witness in a criminal case, in any stage of the prosecution, from appearing or testifying. Revised Statutes, Sec. 880.

To constitute the offence under such section it is not essential there should be pending a criminal case in the technical sense, nor that the witness on whom the persuasion is attempted should be under a summons to appear; it suffices there is in contemplation an investigation on appropriate indictments by the grand jury, of which the accused has knowledge, it being known to him also that the party sought to be persuaded not to testify is a material witness in aid of such indictments, and that with such knowledge such persuasion is attempted by the accused. *Ibid.*, 41 An. 841.

McEnery, J., on Application for a Rehearing.—Courts can not, on the theory of mischief intended to be prohibited, enlarge statutes beyond the fair significance of the language employed, but a statute must have a construction commensurate with its manifest object.

The "stages" of the prosecution include the investigation by the grand jury, which results in finding the bill; hence, if the persuasion is used to prevent the witness from going before the grand jury, the investigation before that body is a stage of the prosecution in the sense of the statute.

If the attempt is to prevent the witness from testifying in a contemplated investigation before the grand jury, resulting in the finding of the indictment, the offence is accomplished, though the case, in its technical sense, does not exist until the indictment is found. When that occurs the case may be deemed to relate back to the initial step, the finding of the grand jury.

A PPEAL from the Criminal District Court for the Parish of Orleans. *Ferguson, J.*

E. A. O'Sullivan and Jas. C. Walker for Defendant and Appellant:

I.

An indictment charging an attempt, by persuasion, to hinder and prevent a witness from appearing and testifying, should set forth that there was a "criminal case," or "charge," or "prosecution," or investigation pending at the time when such attempt was made; also before what court, magistrate or grand jury the criminal prosecution was pending. R. S. 880; State of La. vs. Taylor, 44 An. 967; State of La. vs. Tisdale, 41 An. 338.

The allegation that certain bills of indictment for felony and bribery were intended, and about to be preferred against certain councilmen of the city of New Orleans, is not equivalent to the necessary averment, in substance, that a "criminal case," or "charge," or "prosecution," or investigation was pending at

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any stage of the prosecution from making the oath in any order to obtain a warrant of arrest to the final trial inclusive, at the time it is alleged such attempt to hinder and prevent was made, according to the statute. R. S. 880.

The indictment should recite in what parish of this State, or elsewhere, such criminal case, charge, prosecution or investigation was pending at the time of the alleged attempt.

Although it is not necessary that a person be actually summoned to constitute him a witness, it should be clear in the indictment that the person upon whom the attempt to hinder and prevent was made was actually a witness in a criminal case of proceeding, etc., pending at the time, etc., and not leave this fact to intendment or inference; also where or before what court, magistrate or grand jury he was to appear and testify.

II.

It is true, a person may be a witness without being summoned, in the sense that he has knowledge respecting the facts connected with a "criminal case," but to constitute a witness in the sense contemplated by the provisions of R. S. 880, upon whom an attempt may be made to bribe or prevent him from appearing and testifying, it is necessary that such criminal case be pending "at some stage of the prosecution, from making the oath in any order to obtain a warranty of arrest to the final trial inclusive." State vs. Taylor, 44 An. 967; State vs. Tisdale, 41 An. 338.

R. S. 880 does not create any such offence as an attempt by persuasion to hinder or prevent a witness from appearing or testifying in a criminal case; the only "attempt" therein denounced and made penal is an "attempt to bribe a witness" in a criminal case, in any stage of the prosecution, from, etc., to prevent him from appearing and testifying.

R. S. 880 is a reproduction of Sec. 1 of the Act of 1869, p. 63, minus the title, which does not include the word "attempt;" it is only the actual prevention of a witness by persuasion from appearing and testifying that is made punishable by the statute. Therefore there is no case against the accused unless he be charged in the indictment and it be proved by the evidence that the witness,

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Charles Marshall, was actually prevented from appearing and testifying as a witness.

Persuasion is not *per se* an attempt, and does not amount to an attempt in any case, except it be made such by express statutory enactment, controlling reason and authority; nor is persuasion expressly defined or declared to be an attempt by the provisions of R. S. 880. At common law, solicitation to commit crime is indictable as solicitation, not as an attempt. Reporter's note to *Stabler vs. Com.*, 40 Am. Rep. 656, from 95 Penn. St. 318; *Wharton Cr. Law*, 9 Ed. 170; *State vs. Baller*, 26 W. Va. 90; 53 Am. Rep. 66; *Com. vs. Randolph*, 146 Penn. St. 83; 28 Am. St. Rep. 782; *Smith vs. Com.*, 54 Penn. St. 209; 93 Am. Dec. 688; *Hawkins c. 74*; *State vs. Butler*, 8 Wash. St. 194; 40 Am. St. 900; *Cox vs. People*, 82 Ill. 191.

III.

R. S. 880 does not prohibit the act of preventing, or the attempt to prevent a witness from appearing and testifying by persuasion, but inflicts a punishment only after a person is convicted of the act of preventing, by persuasion, a witness from appearing and testifying; the said section imposes a penalty, but does not prohibit, and is therefore nugatory, as in case of a law which prohibits an act without providing punishment for the act when committed.

IV.

The allegation in the indictment that certain bills of indictment "were intended and about to be preferred for felony and bribery against certain councilmen of the city of New Orleans, and that the accused knew that Charles Marshall was a witness therein," does not authorize the introduction of affirmative proof to show that an investigation was pending relative to charges against other councilmen of the city of New Orleans for other crimes not referred to in the indictment, wherein said Charles Marshall is not alleged to be a witness.

And it is reversible error if the court go beyond the issue of the pleadings, outside the terms of the accusation against defendant, and instruct the jury * * * "but the jury must be satisfied from the evidence, beyond a reasonable doubt, that a prosecu-

tion was actually pending against one or more councilmen referred to in the indictment wherein Charles Marshall was a witness, or an inquiry as to the commission of crimes by members of the council of the city of New Orleans was being actually made by the grand jury, and that the accused did at the time attempt to hinder and prevent him from appearing, and to testifying as a witness therein, in any of the stages of the said prosecution from making the oath or affidavit in order to obtain a warrant for the arrest of said councilmen, or either of them, until the said bills of indictment were preferred, while such investigation was still on foot." Such charge extends the scope of the jury's inquiry to matters and crimes not referred to in the indictment, including crimes other than felony and bribery, and against other councilmen than those referred in the indictment, and wherein it is not alleged that Charles Marshall was a witness.

V.

And it is error, excepted to before the jury retired, that the court below, just before instructing the jury according to the charge just stated, also instructed as follows, in a manner altogether inconsistent and contradictory thereto: "I charge you, gentlemen of the jury, that it is not requisite, in order to constitute the crime charged in the indictment, that a criminal prosecution should actually be pending before the grand jury at the time of the alleged unlawful attempt by the defendant to prevent, by persuasion, the witness, Charles Marshall, from appearing as a witness before said body."

And further error, that the court refused to charge in the same connection, "that the jury must be satisfied from the evidence, beyond a reasonable doubt, that a prosecution was actually pending against one or more councilmen referred to in the indictment wherein Charles Marshall was a witness, and that the accused did at the time attempt to hinder and prevent him from appearing and testifying as a witness therein in any of the stages of the said prosecution from making the oath or affidavit in order to obtain a warrant for the arrest of said councilmen, or either of them, until the said bills of indictment were preferred.

And because the court refused to charge:

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"The jury must be satisfied from the evidence, beyond a reasonable doubt, that an investigation relative to bribery and corruption charged against the councilmen of the city of New Orleans, referred to in the indictment, was actually pending before the grand jury at the time of the alleged attempt to prevent the witness, Charles Marshall, from appearing and testifying therein, and that said Charles Marshall was a witness in said proceedings."

After the court has allowed to go to the jury, over the defendant's objections, evidence introduced by the State, and excepted to, that he and others, members of the city council, engaged in a purpose for which they were separately indicted in other cases, to induce the prosecuting witness to pay money to favor his petition for privileges, and also testimony to falsify defendant's representations to the witness at the time it is alleged he attempted, by persuasion, to prevent him from appearing and testifying, the court should not refuse to instruct the jury as requested in defendant's behalf: "I charge you, that the accused is on trial for having violated Sec. 880, relative to prevent a witness from appearing and testifying as a witness; he is not charged either with bribery or perjury, and no charge of bribery or perjury can be entertained." It is reasonable, pertinent and appropriate to request such charge, as cautionary; and it is unreasonable to refuse it, because it could not by any means injure the case for the prosecution.

VI.

It is error to charge the jury, as excepted to in defendant's behalf that they "must apply the law which has been given to them by the court." The rule in the Spencer case is that the judge must charge the jury subordinately to the powers of the jury. *State vs. Spencer*, 45 An. 1; *State vs. Hannibal*, 37 An. 619; *Brown vs. State*, 6 Baxter (Tenn.), 425; *State vs. Tally*, 23 An. 677; *State vs. Jurche*, 17 An. 71.

VII.

R. S. 880 makes no discrimination as to witnesses who are hindered and prevented from appearing and testifying whether they are material or otherwise, or whether they know much or little of

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the facts concerning criminal cases wherein they are witnesses. The guilt or innocence of the parties charged in criminal cases does not tend to prove or disprove whether the accused attempted to prevent the witness from appearing and testifying as a witness in the proceedings against them; and, therefore, when the State announces its purpose to prove that the witness had full knowledge of the crimes charged in the criminal cases referred to, it is not competent evidence to allow the witness to testify to all the facts of the cases in his knowledge and any statement made in the presence of the accused referring to said criminal cases, and to connect him with them.

The inquiry should be restricted to proof of the fact that the party was a witness, and that the accused knew the fact that he was a witness, and attempted to prevent him, etc.; the testimony should not extend to proof of details and *minutiae* of other, and distinct crimes and offences, to connect the defendant with them.

In effect, such method of prosecution is to convict an accused of one crime by proof that he was guilty of other crimes, which he is not called upon to answer.

VIII.

On the trial of an accused for attempting, by persuasion, to prevent a witness from appearing and testifying, it is collateral and irrelevant whether the representations he made to the witness were true or false; therefore, to introduce evidence on the trial to prove that they were false, raises an issue which defendant is not called upon to answer, and which tends to his injury and prejudice before the jury.

It is not a sufficient reason to influence the court to allow such evidence to be introduced "that it is but just and proper that the chief magistrate of this great city be permitted to make a statement in reference to the charge that was publicly made yesterday in a court of justice. The charge was a very serious one, made in the presence of a very large number of people. It is not a question whether Mr. Fitzpatrick needs or requires vindication. I think, as a matter of justice to the mayor of this city, that he should be permitted, if he deems proper, to make a statement."

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M. J. Cunningham, Attorney General, *Chas. A. Butler*, District Attorney, *John J. Finney*, Assistant District Attorney, *Lionel Adams*, of Counsel for the State.

I.

The Testimony of Charles Marshall.

The hypothesis of the State was: (1) That although up to the 22d of June, 1894 (the date of the offence charged in the indictment), Mr. Marshall had not been summoned as a witness before the grand jury, nevertheless, he was a witness in the sense that he had knowledge of the commission of felonies and briberies for which bills of indictment were intended and about to be preferred against councilmen of the city of New Orleans, including the present defendant; (2) that it was the defendant's knowledge of this which prompted him on the night of June 22 to attempt by persuasion to prevent Mr. Marshall from appearing and testifying before the grand jury.

It is conceded that "it was competent upon the part of the State to show that Charles Marshall was a witness in the sense that he had knowledge of the facts charged in the indictment;" meaning the indictments returned against Councilmen Haley, Caulfield and Thriffley and defendant. But it is contended that the details of the transactions should not be permitted to go to the jury in order that they might determine for themselves whether Mr. Marshall, who had not yet been summoned, was in legal intendment to be considered and treated as a witness because of his knowledge with respect to these crimes.

That Mr. Marshall was a witness was a material allegation of the indictment which required proof. This involved a question of fact to be found by the jury. *State vs. Spencer*, 45 An. 11, 12. Mr. Marshall had as yet neither testified nor been summoned. The jury could not, for the purpose of establishing this evidential fact, accept as true the unsupported averments of any of the indictments, nor could Mr. Marshall be allowed to solve the difficulty by giving as his opinion the conclusion of law, that he was a witness. The only legal way of establishing the truth of this allegation was by doing what was actually done in the case, that is, to require that Mr. Marshall state the facts within his knowledge, and then leave it with the trial jury to determine,

under proper instructions as to the restricted purpose for which the evidence was offered, whether Mr. Marshall was or not a witness in the legal sense.

The jury were instructed that "evidence tending to prove knowledge on the part of the accused that certain indictments against certain councilmen of the city of New Orleans were intended and about to be preferred, and that Charles Marshall was a witness in said proceedings," is to be considered by the jury solely and only for this purpose.

Besides the reason assigned by the trial judge for admitting this testimony, it was relevant and material to show knowledge by defendant that Mr. Marshall was a material witness; to supply a motive for his crime; to show the intent with which he sought to dissuade Mr. Marshall from testifying; to show the relation of the parties and illustrate, qualify and explain, for the benefit of the jury, what was said by and between Mr. Marshall and defendant at the time of the unlawful attempt to prevent the appearance of Mr. Marshall as a witness before the Grand Jury.

If there be no misdirection in the ruling of the court admitting the testimony objected to, the fact that the judge gave wrong reasons in support of his ruling will furnish no ground for a new trial, unless it appeared that the jury were misled by them. A judge at *nisi prius* is not bound to give his reasons. 2 Thomp. Tr., Sec. 2404; Shorter vs. People, 2 N. Y. 193; People vs. O'Neal. 67 Cal. 378; Ellis vs. Jameson, 17 Me. 285; Carpenter vs. Pierce, 13 N. H. 403, 408.

In this case the trial judge's reasons for admitting the testimony of Mr. Marshall were stated after the jury had been directed to retire.

"The universal rule recognized by appellate courts is that where a ruling has not operated to the prejudice of the party complaining, a new trial will not be granted; for however remiss in his duty the judge may be, and how censurable soever his conduct, if a correct result has nevertheless been obtained, the verdict will not be disturbed. The remedial interposition of the appellate courts in granting new trials is wholly for the benefit of the parties, and not to compel the good conduct of judges." 8 Gra. & Wat. N. T. 717; 2 Cain, 85; 3 Gilm. 202; 2 Turn. R. 5; 9 Cow. 680; 1 Scan. 18; 1 Gilm. 475; 2 Ib. 185; 11 Conn.

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342; 7 Greenl. R. 442; 4 Day, 42; 10 Ga. 429; 1 Brev. 109; 23 Wend. 70; 4 Lee & M. 388; 24 Ver. 242; Whart. Cr. P. & P., Sec. 793; 1 Bish. Cr. Pro., Secs. 1276, 1277; 3 Graham & Waterman N. T. 928; 9 Am. and Eng. Ency. Law, 755; 11 An. 480; 16 An. 384; 30 An. 1271; 35 An. 96; *Ib.* 317; 6 An. 652, 658; 35 An. 970; State vs. Walsh *et als.*, 44 An. 1136; State vs. Donlon *et als.*, 45 An. 755.

Should the testimony have been admitted for the additional reasons here suggested?

As to the relevancy *vel non* of Marshall's testimony:

"Relevancy is that which conduces to the proof of a pertinent hypothesis; a pertinent hypothesis being that which logically affects the issue." Whart. Cr. Ev., Sec. 23. "Relevancy is, therefore, to be determined by free logic, unless otherwise settled by statute or controlling precedent. All facts, that go either to sustain or impeach a hypothesis logically pertinent, are admissible. But no fact is relevant which does not make more or less probable such a hypothesis. Relevancy, therefore, involves two distinct inquiries to be determined by logic, unless otherwise arbitrarily prescribed by jurisprudence: (1) Ought the hypothesis, if proved, to affect the issue? (2) Does the fact offered in evidence go to sustain this hypothesis?" Whar. Cr. Ev., Sec. 24.

"Evidence must tend to prove issue. It is not necessary, however, that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue, or constitutes a link in the chain of proof; although, alone, it might not justify a verdict in accordance with it." 1 Greenl. Ev., Sec. 51 a.

"The rule excluding evidence of collateral facts, treats as collateral facts only those 'which are incapable of affording any reasonable presumption or inference as to the principal fact or matter in dispute.'" 1 Greenl. Ev., Sec. 52.

As to knowledge and intent:

"In the matter, however, of collateral proof, one class of exceptions is universally recognized. In cases where the knowledge or intent of the party was a material fact, on which the evidence, apparently collateral and foreign to the main subject, had a direct bearing, collateral proof was admitted." 1 Greenl. Ev., Sec. 53; State vs. Keyes, 8 Vt. 66; State vs. Carpenter, 20 Vt. 12, 13.

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As to motive:

"When there is a question whether any act was done by any person, the following fact is deemed to be relevant; that is to say, any fact which supplies a motive for such an act." Steph. Dig. Law Ev. 36; 7 Am. and Eng. Ency. Law, 50.

As to relation of parties and facts explaining a fact in issue:

"Facts necessary to be known to explain or introduce a fact in issue or relevant, or deemed to be relevant to the issue, or which support * * * an inference suggested by any such fact, * * * or which show the relation of the parties by whom any such fact was transacted, or which afforded an opportunity for its occurrence or transaction, or which are necessary to be known in order to show the relevancy of other facts, are deemed to be relevant in so far as they are necessary for those purposes respectively." Steph. Dig. Law Ev. 39, 40; 7 Am. and Eng. Ency. Law, 55, 56.

The evidence sought to be introduced not only went to sustain the hypothesis of the State, which is logically pertinent and supplied a motive for the crime charged against the defendant, but is necessary to be known in order to show the relation of the parties and to explain the conduct and language of the defendant at the time of the commission of the particular crime charged against him in the present bill of indictment.

The further objection is insisted upon that the testimony should have been excluded, because it had the effect of showing the perpetration by the defendant of a crime other than the one for which he was being prosecuted.

Under the circumstances of this case there is no merit in such a contention.

The rule of law is that "evidence is admissible of the perpetration by the defendant of a crime other than the one on trial, when it tends to establish that the defendant is guilty of the one charged." State vs. Goodwin, 37 An. 713; State vs. Munco, 12 An. 625; State vs. Benjamin, 7 An. 48; 1 Bish. Cr. Pro., Sec. 1123; Whart. Cr. Ev., Secs. 30, 32, 49.

II.

Testimony of Mayor Fitzpatrick.

In his testimony with regard to what was said at the time of the attempt to prevent his appearance as a witness before the

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grand jury, Mr. Marshall stated that the defendant claimed that he had been commissioned by Mayor Fitzpatrick to call upon Mr. Marshall for the purpose of persuading him not to injure or damage Mr. Fitzpatrick's "administration."

Mr. Fitzpatrick was afterwards placed upon the stand, and in answer to the question: "Did you, on the 22d day of June, or at any other time, authorize the defendant, L. O. Desforges, to call upon Mr. Charles Marshall and ask Mr. Marshall not to injure or damage your administration?" The answer was: "No, sir."

It was objected that this testimony was inadmissible, and a bill of exceptions was reserved to the action of the court in permitting it to be heard.

The grounds suggested for excluding the evidence were: (a) That it was immaterial whether the mayor could establish his reputation or protect himself against what witnesses might say in their testimony. (b) That the testimony of the witness, Charles Marshall, has neither been contradicted nor impeached, and, therefore, the same could neither be controverted nor affirmed. (c) That it was irrelevant.

- (a) It is not, and never was pretended that the admissibility of this evidence could be justified upon the plea that the mayor, who had been misrepresented, should be given an opportunity to vindicate himself.
- (b) No endeavor was made either to support or to impeach the statements of Mr. Marshall, which were not disputed, nor could the testimony elicited from Mr. Fitzpatrick have any such tendency. The purpose was to show that the defendant, believing that consideration for the wishes of Mr. Fitzpatrick would have weight with Mr. Marshall, sought to make effective his attempt to persuade Mr. Marshall not to appear and testify by producing a false impression as to Mr. Fitzpatrick's connection with the transaction.
- (c) The evidence was relevant and material because: (1) It conduced to the proof of a pertinent hypothesis—one that logically affected the issue (Whart. Cr. Ev., Secs. 23, 24); (2) although alone this falsification, with a view to create a false impression with respect to defendant's motive, would not justify a verdict against him, yet, as a fact, it constituted a link in the chain of

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proof (1 Green. Ev., Secs. 51 a, 52); (8) it disclosed the true intent of defendant, and supplied a motive for the resort to falsehood in his attempt to prevent the attendance of the witness (1 Green. Ev., Sec. 53; Steph. Dig. Law Ev. 36; 7 Am. and Eng. Ency. of Law, 50); (4) it established the giving of a false reason for the criminal act (State vs. Reed, 62 Me. 129), and the saying by defendant of something intended to produce a false impression touching the fact in issue, and his connection with it. Steph. Dig. Law Ev., 36, 39.

III.

The Charge of the Court—Duty of Jurors as “Judges of the Law.”

The trial judge, in his original charge, instructed the jury as to their duties and powers as “judges of the law,” in these words: “The Constitution of this State makes jurors the judges of the law, as well as of the facts in criminal cases. The jury must find the facts which they believe to have been proven, and when they consider what, if any, crime results from the state of facts, they must apply the law which has been given to them by the court.

“A jury can not rightly exercise the physical power of disregarding the instructions of the court upon the law any more than they can rightfully find a verdict directly opposed to the proof of facts.”

Whatever views may formerly have been entertained upon this subject, it is now the settled jurisprudence of the State that “the jury is bound to accept and apply the law as laid down by the judge, and that while it has the power to disregard it, yet, in so doing, it would violate its oath and duty.” State vs. Matthews, 38 An. 776; State vs. Ford, 37 An. 465; State vs. Cole *et als.*, 38 An. 846; State vs. Tisdale, 41 An. 341; Breaux, J., in Callahan’s case, *ante*, p. 444; State vs. Johnson, 30 An. 905; Const. of La., Art. 168.

And this rule of construction is almost universally recognized and accepted in the United States courts and in those of the sister States. Proff. Jury Trls., Sec. 376; 2 Thomp. Tr., Secs. 2122, 2134; Pierce vs. State, 18 N. H. 533; Robbins vs. State, 8 Oh. St. 131; Batre vs. State, 18 Ala. 119; State vs. Drawdy, 14 Rich. L. (S. C.) 87; Duffy vs. People, 26 N. Y. 588; United States

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vs. Morris, 1 Curt. C. C. (U. S.) 23; Montgomery vs. State, 1 Oh. 424, 427; Hamilton vs. People, 29 Mich. 173; Pennsylvania vs. Bell, Add. (Pa.) 156, 160; Georgia vs. Brailford, 3 Dall. (U. S.) 1, 4, opinion by Jay, C. J.; Washington vs. State, 63 Ala. 135; S. C. Am. Rep. 8; Sweeney vs. State, 35 Ark. 586; Pleasant vs. State, 23 Ark. 360.

It is contended, however, that, in State vs. Spencer, the Supreme Court distinctly reversed this long line of authorities without so much as even referring to them or to the principle upon which they are made to rest.

This assumption is not borne out by the opinion rendered in the case which to a different state of facts applied an entirely different rule of law.

The point at issue was not in any sense dependent upon the right or power of the jury to disregard the instructions of the court as to the law of the case. The matter involved was whether in a trial for perjury the materiality of the false oath was a fact to be found by a jury, or a question of law to be determined by the court; and the court, speaking through the Chief Justice, said that "the accused had the legal right to submit his case to the jury on the subject of the materiality of the testimony given by him to the issue in the case in which it was given (it being, as we have said, a mixed question of law and fact), not only on the evidence but on the law; and this statement is not inconsistent with the right of the court to charge the jury on the law applicable to the matter." It was in this connection that the court held that while it was the duty of the trial judge to charge the jury, yet, "in the performance of that duty he must, in this State, do so subordinately to the rights and powers of the jury, and to the requirements of Section 991 of the Revised Statutes as to commenting upon the evidence." State vs. Spencer, 45 An. 11, 12.

There was no pretence at defining the general "rights and powers of the jury," or at questioning the binding force of a rule which announced to be "the settled doctrine of our jurisprudence on the question of the powers of juries in criminal cases." State vs. Cole *et als.*, 38 An. 846.

IV.

The Pendency of a Criminal Cause.

Some days before the time when the offence charged in the present indictment is alleged to have been committed, the grand jury were requested by the District Attorney to investigate the means by which the resolutions with reference to the track privileges of the Louisville & Nashville Railroad Company on the river front, were passed, and were informed that Mr. Marshall should be summoned as a witness.

The matter was then regularly before the grand jury for investigation and action, upon the complaint and information of the prosecuting officer, and, as shown by the indictments incorporated into the record as part of the evidence offered on the trial, the inquiry resulted in the finding of three bills of indictment, against the councilmen of the city of New Orleans, for proposing to be bribed to support the resolutions granting these track privileges to the railroad company.

The essence of the offence denounced by Sec. 880 is the obstruction of the due course of justice. If defendant knew that Marshall was a witness and about to be compelled to attend before the grand jury, and endeavored to dissuade and hinder him therefrom, his offence was complete. It will not do for a moment to admit that the defendant might anticipate the officers of justice and hinder, secrete and bribe the State witnesses from attending an inquiry by the grand jury into the commission of a crime, and would not be liable for anything done until the investigation should have been so far proceeded with that some evidence was taken. This view would leave untouched the most corrupting fields to offenders of this character, and can not reasonably be considered to have been intended by the Legislature. All of these considerations are borrowed from the reasoning of Redfield, J., in *State vs. Keyes*, which commends itself to the approval of every unprejudiced mind. 8 Vt. 62-67. See also *State vs. Tisdale*, 41 An. 341.

The grand jury were sworn to "diligently inquire and true presentment make of all such matters and things" as shall be given them in charge. 1 Archib. P. and P. (Pomeroy's Notes), 505.

By express statute it is made felony, punishable at hard labor for not less than one nor more than five years, in any grand juror to fail to disclose to the grand jury any crime committed within the parish, which may have come to his personal knowledge, or of which he may have been informed. R. S., Secs. 883, 2140.

Therefore in intendment of the provisions of Sec. 880, there was a criminal cause in one of its stages actually pending before the grand jury from the time that the matter of the investigation of the passage of the resolution with respect to the track privileges in question was given them in charge by the suggestion made and information communicated to them by the District Attorney.

In so far as it affects the present prosecution against defendant, the statute provides: "Whoever shall be convicted of * * * attempt * * * by persuasion, to prevent any witness in a criminal case, in any of the stages of prosecution, from making the oath in order to obtain a warrant of arrest, to the final trial inclusive, from appearing or testifying as a witness, shall be sentenced," etc. R. S., Sec. 880.

The intention of the Legislature was evidently to prevent any corruption of or interference with the due administration of justice, and to denounce and punish any assault upon its purity, no matter at what stage it may have occurred.

The use of the collocation of words, "from making the oath in any order to obtain a warrant of arrest, to the final trial inclusive," was not intended by the Legislature to operate as a limitation of, or restriction upon what had gone before. It was purely illustrative, and was meant to emphasize the declaration that the provisions of the statute should apply to every stage of a criminal case.

The ascertainment of the law-maker's intention "is the cardinal rule, or rather, the end and object, of all construction; and where the real design of the Legislature in ordaining a statute, although it be not precisely expressed is yet plainly perceivable, or ascertained with reasonable certainty, the language of the statute must be given such construction as will carry the design into effect, even although in so doing, the exact letter of the law be sacrificed, or though the construction be, indeed, contrary to the letter." And the rule holds good even in the construction of criminal statutes. Endlick, Interp. Stat., Sec. 295; Suther, Stat. Constr., Secs. 234, 235.

The statute declared it to be immaterial at what particular stage of prosecution, in a criminal case, the attempt was made to dissuade a witness from testifying. It was not, therefore, necessary either to allege or to prove the stage of prosecution which had been reached; the essential, and only essential thing was to show a criminal case such as was understood and intended by the Legislature. To hold that an investigation set on foot by the grand jury, or a matter given them in charge by the prosecuting officer, is not a stage in a criminal case is to defeat the legislative purpose and to declare that any witness before the grand jury, in a cause originating in that body, is not a witness in a criminal case, and this whether summoned or not, or whether he has actually testified or not. If the expression "from making the oath in any order (whatever that may be) to obtain a warrant of arrest," is to qualify and control the stage of the prosecution, or if a criminal cause be limited to prosecutions actually returned into court and recorded and filed, then a construction will be maintained which absolutely nullifies and defeats what was intended by the Legislature, and affords no protection against corrupt endeavors to bribe, secrete or hinder the attendance of witnesses before the grand jury.

V.

Does the Indictment Allege a "Criminal Case" Pending?

The indictment in the present case pursues with cautious exactness the precedent furnished by Dr. Wharton in his form (672) for "Conspiracy to induce a material witness to suppress his testimony." 2 Whar. Prac. Ind. and Pleas. 251.

In a prosecution pursuant to Sec. 880 it is immaterial and therefore unnecessary to allege or prove at what stage of prosecution the attempt to prevent the witness from appearing or testifying was made. Nor in charging that the "attempt" was made with respect to a witness in a criminal case, is it necessary to employ the identical words of the statute; it is sufficient if the fact be set out as to comply substantially with the statute. *State vs. Smith*, 5 An. 340; *State vs. Hood*, 6 An. 179; *State vs. Price*, 37 An. 215, 219; 1 Bish. Cr. Proc., Sec. 612.

The indictment avers a criminal case pending by alleging that certain bills of indictment were intended and about to be prefer-

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red, and that Marshall was a material witness in support of said bills. It lays the venue by setting out that the bills of indictment were intended and about to be preferred against certain councilmen of the city of New Orleans, for an offense committed in their official capacity, to-wit, bribery.

Be this as it may, it is, in this State, provided by express statutory enactment that it "shall not be necessary to state any venue in the body of any indictment, but the State, parish or other jurisdiction named in the margin thereof, shall be taken to be the venue for all of the facts stated in the body of such indictment." R. S. 1062.

But assuming that the indictment was defective in these particulars, does it lie with the defendant to complain after the verdict?

Sec. 1064 of the Revised Statutes of the State declares: "Every objection to any indictment for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash such an indictment, before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect, may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no such defect had appeared."

Among the corrections which the Legislature declared could thus be made by amendments, is included "the name or description of any matter or thing whatsoever" in the indictment named or described. R. S., Sec. 1047.

It is respectfully submitted that the defects complained of in the indictment are in their nature such formal defects as can be objected to only by demurrer.

Another consideration. As stated by Mr. Bishop, "at common law, the verdict cures some things, as to which the rule is the same in criminal causes as in civil. It is that, though a matter either of form or of substance is omitted from the allegation, or alleged imperfectly, still, if under the pleadings the proof of it was essential to the finding, it must be presumed after verdict to have been proved and the party can not now for the first time object to what has wrought him no harm." Bish. Cr. Proc., Sec. 707 a.

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The same principle is recognized by Mr. Wharton, who says: "So the verdict will cure the omission to connect necessary and dependent members of the same sentence by their appropriate copulatives, and also merely formal or clerical errors. So it is with essential averments, of which the verdict implies the truth, but which are imperfectly stated. 'There is a general rule as to pleading at common law, and I think it is right to say that there is no distinction, where questions of this kind arise, between the pleadings in civil and criminal proceedings,' said Blackburn, J., in 1878, 'that where an averment which is necessary to support a particular part of the pleading has been imperfectly stated, and a verdict on an issue involving that averment is found, and it appears to the court after verdict that unless this averment were true the verdict should be sustained, in such case the verdict cures the defective averment, which might have been bad on demurrer.' The authorities upon this subject are all stated in 1 Williams Saund, 260, n. 1 (last Ed.);" Whart. Cr. P. and P., Sec. 760.

The law will not permit a defendant to take his chances as to the result of the trial upon an indictment which he, upon due objection, could have had corrected and then after conviction seek to escape punishment by suggesting the defects which should have been urged in season. So that even if the matters complained of really constituted defects in the indictment, the defendant has slept upon his rights and could not be heard to explain.

VI.

The Charge to be Construed as a Whole.

It is also urged that there was reversible error in the modified charge submitted by the court for the fourth of the special instructions requested on defendant's behalf. The contention is, that "the judge's charge certainly goes very far beyond any issue made by the indictment and defendant's plea of not guilty, and authorizes the jury to base their verdict upon matters clearly outside of the accusation against the accused."

Instructions are construed with reference to the evidence on which they are based. 2 Thomp. Trials, Sec. 2408 (continued). And "an instruction is not to be disposed of by dissection; if good

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as a whole it will stand. Few rules are better settled than that an instruction is to be taken in its entirety." *Nave vs. Flack*, 90 Ind. 205, 211; 2 *Thomp. Trials*, 1757; 11 *Am. and Eng. Ency. Law*, 250; *State vs. Munston*, 35 An. 888; *State vs. Garic*, *Id.* 970; *State vs. Ferguson*, 37 An. 51; *State vs. Hannibal*, *Id.* 619.

The allegation of the indictment is that Charles Marshall was a material witness in support of "certain bills of indictment for felony and bribery (which) were intended and about to be preferred against certain councilmen of the city of New Orleans, who, as such, were municipal officers within the State." The proof at the trial was expressly restricted to the cases of felony and bribery specified in the indictment.

The purpose of the court was evidently to make it clear that it was necessary that a technical prosecution should be actually pending in the sense that an indictment had, in fact, been presented or an information been filed, but that it was sufficient if an inquiry in the commission of crime was actually being made by the grand jury. The jury was instructed as to what it was essential for them to find from the evidence, and what was said by the court with respect to a pending inquiry by the grand jury was to be construed in the light of what had gone before. It was the commission of crimes referred to in the indictment which the jury was to be satisfied from the evidence was being actually inquired of by the grand jury.

Admitting, however, that the judge was in error in thus illustrating, by reference to crimes committed by councilmen, the legal proposition that any inquiry by the grand jury was a criminal case in indictment of the statute, in what respect has the defendant been prejudiced?

The rule is that, where it is apparent that the defendant could not have been prejudiced, he can not complain that an instruction which was given has no application to any evidence adduced in the case. *State vs. Johnson*, 33 An. 889. And although there may be error in an instruction given to the jury, yet, when such instruction could not have resulted in injury to the prisoner, it is error without prejudice. *State vs. Cazeau*, 8 An. 109; *State vs. Tompkins*, 32 An. 621; *State vs. Thomas*, 28 An. 170; *State vs. Turner*, 35 An. 1103.

VII.

Does the Statute Punish an "Attempt."

Counsel for the prisoner contend "that there is no crime contained in Sec. 880 of the Revised Statutes, responsive to this indictment."

The indictment alleges that the defendant "did feloniously and corruptly, by felonious and unjust solicitation and persuasion, attempt to hinder and prevent the said Charles Marshall from appearing and testifying as a witness," etc.

Punctuation in a statute forms no part of law, but is the work of the draughtsman, engrosser or public printer. It may be and frequently is disregarded altogether, and courts will correct and re-punctuate to give effect to what is plainly the legislative intent. *U. S. vs. Isham*, 17 Wall. (U. S.) 496; *Hammock vs. Farmers' L. C. T. Co.*, 105 U. S. 77; *U. S. vs. Lacher*, 184 U. S. 624. In this last case, Fuller, C. J., said: "For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required."

"In another case, a comma was allowed to be taken from before a word and placed after the same word, to give effect to the true purpose of the statute." *Albright vs. Payne*, 48 Ohio St. 14.

In the construction of statutes for the purpose of arriving at the real meaning and intention of the law-maker, the rule is stated by the Oregon court to be that the court will disregard the punctuation, or re-punctuation, if need be, to render clear the true meaning of the statute. *State vs. Payne County (Oregon, 1892)*, 29 Pac. Rep. 789.

If read with such stops as are manifestly required, the meaning of Sec. 880 of the Revised Statutes is made plain and unambiguous, and effect is given to all of its parts.

Re-punctuate so as to precede and follow the word "attempt," with a comma, and the statute paraphrased will enact: "whoever shall be convicted of * * * attempt * * * by persuasion, to prevent any witness in a criminal case, in any state of the prosecution * * * from appearing or testifying as a witness, shall be sentenced to imprisonment at hard labor in the penitentiary not less than one nor more than five years."

Can any motive be assigned which could have weight in showing that the Legislature intended to punish the actual prevention by persuasion of the giving of testimony by a witness, but not the corrupt attempt at prevention?

As has already been said, "the essence of both offences is the obstruction of the due course of justice. The mere endeavor to dissuade a witness from giving evidence or to advise a prisoner to escape or stand mute, are all impediments to the due course of justice, and are by the common law considered as high misdemeanors. The mere attempt to stifle evidence is a crime, though the attempt should not succeed." 1 Bl. Com. 126; 2 Chitty C. L. 236; 6 East. 466; 2 Strange, 904; State vs. Keyes, 8 Vt. 59, 65; State vs. Carpenter, 20 Vt. 12; 1 Bish. Cr. Law, Sec. 468; 2 Whar. Cr. Law, Sec. 1333.

To attempt to prevent, either by persuasion or intimidation, a witness from attending a trial, is and has always been a common law offence, punishable by indictment both in England and in this country. In so far as the due administration of justice is affected, there is no conceivable difference in the moral obloquy of the offender, whether his unlawful attempt were successful or not. To hold to the construction contended for by counsel would amount to this, if the attempt to prevent proved successful there could be no conviction, because there would be no proof. On the other hand, if the attempt failed there could be no prosecution, because the attempt is not to be considered as an offence within the intendment of the statute.

But it is argued that the present Sec. 880 of the statutes is borrowed from the Acts of 1869, No. 63, and that the title of that act refers, in enumerating its objects, to "any person guilty of preventing any witness, in any criminal proceeding, from appearing or testifying, from force, or threat, or intimidation, or persuasion," and that it nowhere alludes to an "attempt to prevent."

While this is true, it is also true that an "attempt to bribe any witness" is not provided against in the title. If there be any force in the contention of counsel "that if it had been the intention of the Legislature to punish an attempt to commit the crime of preventing a witness" from appearing and testifying, the word "attempt" would be indispensable in the title of the

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act; then equally must it be maintained that it was not the intention of the Legislature to punish the attempt to bribe a witness to prevent him from appearing and testifying.

Then, again, if there must be an actual prevention, how could an unsuccessful attempt at bribing a witness result in preventing him from appearing and testifying in the cause?

Up to 1870, therefore, although the Legislature clearly intended to punish an attempt to bribe a witness, and also an attempt by persuasion to prevent a witness from testifying, nevertheless neither of these purposes could be carried into effect because they were not expressed in the title.

It was not because the Legislature had not intended and undertaken to punish these offenses, but because the legislative purpose, in this direction, was rendered nugatory by a failure to comply with the constitutional provision that "every law shall express its object or its objects in its title."

In 1870, Act 96, of the session of that year, was passed, of which one of the objects as expressed in its title was to make provision "relative to crimes and offenses; the definition of crimes and offenses, and the penalty therefor."

This broad and comprehensive title included within its terms every object contemplated in the statute, in so far as concerns the creation and punishment of crimes and offenses. One of the sections of this act embraced within the terms of this portion of the title is Sec. 880, usually known and designated as Sec. 880 of the Revised Statutes of the States.

Much stress seems to be laid by counsel upon the force of the argument that the Legislature could not be presumed to have intended "to punish an attempt to commit a crime with the same severity of punishment that is meted out for actually committing the crime."

If such a contention needed refutation, a complete answer is to be found in the very terms of the statute itself, which punishes the person convicted of bribing a witness in exactly the same terms as it does the person who attempts to bribe a witness.

The discretion vested in the trial court in meting out punishment (the penalty being imprisonment at hard labor in the penitentiary not less than one nor more than five years), makes it possible to so regulate the sentence as to make it commentary to the degree of culpability.

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VIII.

Whether Persuasion is an Attempt.

A very labored effort has been made to establish as a legal proposition that an attempt by persuasion to prevent a witness from testifying is not indictable because bare solicitations or allurements can not be construed into indictable attempts.

But counsel themselves concede the proposition laid down by Mr. Wharton that solicitations to commit crime are independently indictable when their object is interference with public justice, and that the better opinion is that there the solicitation is in itself a substantive offense. 1 Whart. Cr. L., Sec. 179.

Of course, in this State all offenses are statutory, and every offense created by statute is a substantive offense. The attempt by persuasion to prevent a witness from testifying is independently indictable in this State, because here by statute it is made a substantive crime. Nor is our jurisprudence in this respect in derogation of the common law.

As said by Mr. Bishop, "some acts are made substantive crimes, not so much on account of their inherent evil as of their tendency to promote ulterior mischief. Thus, * * * preventing the attendance of witnesses and the like are indictable, because they are calculated to pervert public justice. * * * these wrongs are substantive crimes, instead of attempts." 1 Bish. Cr. L. Sec. 734.

"To attempt to prevent, either by persuasion or intimidation, a witness from attending a trial is not merely contempt of court, but may be punishable by indictment." 2 Whart. Cr. L., Sec. 1333.

"To thwart or obstruct the due administration of justice by violence, bribery, threats, or other unlawful means, whether in preventing the attendance of witnesses, jurymen, or other officers of the court, is a high-handed offence, which strikes at the vitals of judicial proceedings, and subjects to severe animadversion in every well ordered community. The attempt to commit such an act, it is well settled, is itself a substantive offence, punishable by the common law." State vs. Carpenter, 20 Vt. 12.

The mere attempt to stifle evidence is a crime, though the attempt should not succeed. State vs. Keyes, 8 Vt. 59, 66; 4 Bl. Com. 126; 2 Chitty C. L. 116; 6 East. 466; 2 Strange, 904.

And it was held in this State, under this very statute, that an attempt by threats and intimidation to prevent a witness from testifying, was an offence. *State vs. Tisdale*, 41 An. 388.

IX.

Does the Statute Create an Offence.

Counsel for defendant announce this proposition: "We are living under statutory law, and no act which is not defined and specially prohibited can be considered as a crime rendering the perpetrator of it liable to punishment. Sec. 880 neither defines nor prohibits the act set forth in the text. No one will dispute the proposition that an act, prohibiting without specifying any punishment for its committal, is no crime under the law, because the prohibition must also carry with it the penalty. We state also that punishment inflicted for an act not prohibited will not render the one who commits the act liable to punishment. Sec. 880 simply provides punishment for the committal of certain acts, without any word prohibiting the acts. We ask, where is the statute which prohibits the prevention of witnesses from appearing in criminal cases? Sec. 880 does not do so. All the section says is that when a person is convicted of having 'prevented a witness' he shall be punished. Where, then, is the denouncement? Where is the prohibiting of the act of preventing a witness."

A crime is defined to be a "wrong of which the law takes cognizance as injurious to the public, and punishes in what is called a criminal proceeding prosecuted by the State in its own name, or in the name of the people or sovereign." *Re Bergin*, 31 Wis. 386 (1872); *And. Law Dict.* 283; 4 *Am. and Eng. Ency. Law*, 643.

A statutory crime is an act which has been made a criminal offence by enactment of the Legislature.

Any statute which provides that a person convicted of doing a specified act shall be punished in a definite way, and which describes the act and fixes the penalty, is an act creating and punishing an offence.

To be convicted of a given offence not only presupposes that the person convicted was guilty of the offence, but also that his guilt has been established pursuant to the forms of law. There can be no question here as to the intention of the Legislature.

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Their purpose was to prevent the commission of certain acts enumerated in the statute by fixing penalties therefor.

It is difficult to appreciate what distinction exists in a statute which provides that "whoever shall be convicted of attempt by persuasion to prevent any witness from appearing or testifying, shall," etc.; and one which enacts that "whoever shall attempt by persuasion to prevent any witness from appearing and testifying, on conviction, shall," etc.

It does seem that these statutes are identical. Yet there is no more prohibition in the latter of these two forms than in the other. In the one case, if the proposition of counsel be correct, all the section says is, that when a person is convicted of having attempted to prevent a witness from testifying he shall be punished; in the other, all that the section says is, that when a person has attempted to prevent a witness from testifying, on conviction, he shall be punished. In both cases the affixing of a penalty to the act by implication, at least, prohibits and denounces the same as an offense. It is not the practice in this State to incorporate into a penal statute a precept declaring, in terms, that a specified act is prohibited. If there were any merit in the position thus asserted by counsel, the whole body of our statutes would, in one fell swoop, be declared nugatory.

Thomas J. Semmes, for Defendant, on Application for a Rehearing:

Counsel entertain the belief that, until the decision of this case, no indictment for tampering with a witness has been sustained wherein it was not alleged that at the time of the supposed offence a suit or prosecution was commenced, or an investigation had been initiated, or that the law in some form had been set in motion.

The general impression has been that there could be no witness unless there was a case, and there could be no case unless the law was set in motion.

The Constitution of the United States provides that the judicial power shall extend to all cases arising under this Constitution, the laws of the United States, and treaties made, or which shall be made under their authority.

This clause, says Chief Justice Marshall, "enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it.

"That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case," etc. *Osborn vs. Bank of United States*, 9 Wheat. 819.

It is therefore clear that there can be no case until the law is put in motion. It is equally clear that there can be no criminal case until the commencement of a prosecution; and when a case is initiated, or a prosecution commenced, then there are various stages of the prosecution, and as prosecutions are generally commenced by an affidavit in which a charge is made against an accused person, so that he may be arrested, the statute declares the oath to be the first stage of the prosecution, and from that time until the final trial, the legislator endeavors to secure the administration of justice, and to prevent its obstruction by tampering with witnesses having knowledge, or supposed to have knowledge of the circumstances of the case which has been begun.

Concede that a prosecution may be commenced by the commencement of an investigation by a grand jury, certainly there must be some act of the grand jury to start the investigation before the prosecution can be said to be instituted; the intention of the grand jury can not be considered the commencement of a legal proceeding even if that intention could be ascertained; some step must be taken by the judicial department of the government before it can be said that there is a judicial proceeding, or that a person is a witness as to matters involved in the proceeding.

Section 881 throws light on the construction of Sec. 880 of the Revised Statutes; Sec. 880 punishes the tempter, while Sec. 881 punishes the tempted who yields to the temptation.

Section 881 speaks of a witness in a criminal proceeding—a proceeding which has its stages—and the first stage is the "oath to obtain a warrant of arrest," for the language of the section is "any witness in a criminal proceeding in any of its stages from

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making oath to obtain a warrant of arrest to the final trial inclusive, who shall fail to appear and give evidence when legally required to do so, by reason of being bribed or persuaded not to do so," shall be punished.

Section 880 punishes a person who, by bribery or attempting to bribe, or by persuasion to prevent "any witness in a criminal case in any of the stages of the prosecution from making the oath in order to obtain a warrant of arrest to the final trial inclusive."

Is it not plain that in both sections the legislator had in contemplation a witness in a judicial proceeding. The word "case" is used in Sec. 880, and the word "proceeding" is used in Sec. 881. Both words mean the same thing. "Case" necessarily includes the idea of a proceeding, because, as Chief Justice Marshall said, in *Osborne vs. Bank of the United States*, "when a subject is submitted to the judicial power by a party who asserts his rights in the form presented by law it then becomes a case."

When, therefore, the State or a citizen in criminal matters sets in motion the judicial power against a person, this then is a criminal case, which proceeds until it is finally tried. The commencement of a case is the commencement of a proceeding. What is a proceeding? Webster says it is "the act of one who proceeds," and that it is synonymous with "step," and that "process is a series of actions, motions, or occurrences; progressive act."

A criminal case, like a criminal proceeding, has its steps or stages; it is commenced by some act, and until that act is done there is no proceeding; it proceeds from one step to another, but it has no existence until a step has been taken.

It is clear to my mind that a witness in a contemplated proceeding or case, before the case or proceedings is begun, is not embraced in the statute.

The obstruction of justice contemplated by the statute is the obstruction of a case or proceeding, when that case or proceeding becomes judicially a case or proceeding, and it does not become so until the judicial power is put in motion. The statute never was intended to punish a parent, who in anticipation of a criminal prosecution of his son, should persuade the brother of that son to get out of the way so as to avoid giving testimony against his brother, should he be called on to do so.

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The withholding of testimony so as to prevent a prosecution is a very different thing from baffling the courts in the trial of cases pending before them. Such conduct may be improper, but it is not the obstruction of a criminal case or a criminal proceeding; it is the difference between abstaining and obstructing, and it is this difference which the Legislature recognized in Secs. 880 and 881.

The construction of Sec. 880, R. S., contended for by the State, strikes out two entire lines of that section, viz.: "In any of the stages of prosecution, from making the oath in order to obtain a warrant of arrest, to the final trial inclusive."

The court can not do that. "Where the language of a statute is plain and clear, that language alone is to be consulted." *State vs. Backarow*, 38 An. 316.

"Criminal statutes can not be extended to cases not included within the clear import of their language." *State vs. Peters*, 37 An. 730.

Such statutes can be extended by the law-making department of the State, but not by the courts.

As the law stands now, it is criminal to prevent, or attempt to prevent any witness from appearing or testifying as a witness in a criminal case, when, and only when such an attempt is made at some point of time between the two events mentioned in the statute; that is to say, between the time the oath is made in order to obtain a warrant of arrest to the final trial inclusive.

"In construing penal statutes, courts can not take into view the motives of the law-giver further than they are expressed in the statute." *State vs. King*, 12 An. 593; *State vs. Carzeau*, 8 An. 114.

It is true that Blackstone says an endeavor to dissuade a witness from giving evidence is a misprison and a contempt of court, punishable, but he does not state that such endeavor is so punishable when no case is pending, and the fact that he treats such conduct as a contempt of court, implies that a case must be pending in some court whose authority is contemned.

The note to Blackstone refers to East's Reports, Vols. 6 and 2, and to Strange's Reports, Vol. 2.

The two cases in East refer to solicitations to commit a crime. Justice Lawrence said, in 2 East, 21, that *Rex vs. Lawly* was an

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indictment charging that the defendant, knowing that J. C. was indicted for forgery, endeavored to keep away a material witness for the king, on which there was judgment for the crown. It is clear in that case that a suit was pending at the time of the alleged offence. The defendant knew that J. C. was indicted.

The case in 2 East merely decided that it was a misdemeanor to solicit a servant to steal his master's goods, though the servant do not actually steal the goods. The case in 2 East held that it was a criminal act to endeavor to provoke another to commit the misdemeanor of sending a challenge to fight a duel.

The case in 2 Strange, 904, is thus reported:

"She moved in arrest of judgment after conviction on an information for attempting to persuade a witness not to appear and give evidence against Japhet Crooke for forgery. And the exception taken was that it was not positively averred that Crooke was indicted; it was only laid that the sciens that Crooke had been indicted and was to be tried did so and so; whereas, in all criminal cases the fact must be positively alleged, and not by inference."

The court sustained the information, but there was an averment in it that Crooke had been indicted and was to be tried.

In none of the cases that I can find was an indictment sustained in the absence of an averment that some sort of judicial proceeding was pending against somebody when the witness was tampered with. Case of John Freely, 2 Rob. (Va.) Cases, 1; State vs. Keyes, 8 Vermont, 57.

Argued and submitted, April 13, 1895.

Opinion handed down, June 3, 1895.

Opinion refusing rehearing, June 27, 1895.

The opinion of the court was delivered by

MILLER, J. The defendant, convicted of attempting to prevent a witness from testifying, takes this appeal, relying on various bills of exception to the admissibility of testimony and to the charge of the court.

The indictment has reference to an investigation of charges against members of the city council, intended to be made by the

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grand jury, and charges that the defendant attempted by persuasion to prevent Charles Marshall from appearing and testifying in support of the indictments about to be preferred against the councilmen. The conviction of the accused is under Sec. 880 of the Revised Statutes: "Whoever shall be convicted of bribery, or attempting to bribe, any witness, or by any force or threat, or intimidation of any kind, or by persuasion, to prevent any witness in a criminal case, in any of the stages of the prosecution, from making the oath in (any) order to obtain a warrant of arrest to the final trial inclusive, from appearing or testifying as a witness, shall be sentenced," etc.

The first bill to which our attention has been directed is to the admissibility of the testimony of Marshall as to the conversation between him and the accused, in the course of which the State claims he attempted by persuasion to prevent Marshall from appearing before the grand jury. It appears, from the bills, the defendant visited the witness at his house, referred to the intended indictment of the councilmen for bribery, then the subject of rumor and newspaper comment, and used the alleged persuasion charged on the accused to prevent Marshall from appearing before the grand jury as a witness in the investigation of the bribery charges. The State could prove the offence of the accused only by testimony of the conversation, and that conversation necessarily referred to the bribery charges against the councilmen then supposed to be intended to be laid before the grand jury. Marshall, in testifying, naturally stated the defendant's visit; the reference by defendant to the approaching investigation before the grand jury, and Marshall testified that the conversation related to the subject of that investigation; that is, that the suspected councilmen had sought to obtain money of the railroad company for their votes, as councilmen, for certain railroad privileges the company sought from the city council. It is to the admissibility of Marshall's testimony that in his conversation with the accused allusion was made to the suspected councilmen and their supposed effort to obtain money for their votes, that the bill of exceptions was reserved. It is urged on us, the testimony objected to tended to prove improper conduct on the part of the councilmen, and had no relation to the charge against the accused, not on trial for conspiracy with the councilmen, but only on the charge of attempted persuasion to prevent

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Marshall from testifying. It is claimed Marshall should, in his testimony, have been restricted to the statement of the persuasion, not to appear as a witness, charged to have been employed by the accused. We think the supposed charges against the councilmen were so linked with the criminal persuasion for which the accused was indicted, as to necessitate Marshall's testimony of the conversation. The State was entitled to prove there was an investigation pending, or about to be brought before the grand jury; that accused, aware of this approaching investigation, and that Marshall was a necessary witness, approached him with persuasion, he should not appear and testify. We can not appreciate that Marshall's testimony went beyond the issue, and to exclude in his testimony all reference to the proposed investigation before the grand jury, alluded to in the conversation between the accused and Marshall, would be to strip the criminating testimony against the accused of its force and effect. We think the testimony was properly admitted.

The same line of reasoning, we think, applies to the exceptions reserved by defendant to the admissibility of the indictments found against the councilmen. It was a part of the case of the State to prove the prosecution against the councilmen as a judicial proceeding, in aid of which Marshall was to give testimony, and to prevent the giving of which testimony was the object of the persuasion for which the accused was indicted. Offered for that purpose only, in our view, the indictments were properly admitted.

Another exception reserved by defendant's counsel was to the admission of the testimony of the mayor that he had not sent the accused to Marshall, as stated by the accused, testified to by Marshall. The testimony of the mayor tended to prove that the persuasion charged to have been used by the accused on Marshall was accompanied with a false statement designed to make more effective the persuasion. The testimony that the accused stated to Marshall the mayor had sent him, the accused, had gone before the jury. If true, it tended to mitigate the intent of the accused in his visit to Marshall. Whatever the tendency of the statement of the accused as to the mayor's agency, if in point of fact the asserted suggestion or request of the mayor was a fabrication of the accused to enforce on Marshall's mind the alleged persuasion, the falsehood then was pertinent to show the intent of the accused in

holding out the persuasion. The testimony of the mayor went to show that the persuasion was not innocent, but marked by the deliberate falsehood to sustain it. We find no merit in the bill.

The defendant reserved bills to the charge of the court, as to the weight the jury should give that charge. In varied forms the question as to the functions of the judge and jury in criminal cases has been frequently presented to this court. The statute originally of 1858, now Sec. 991, of the Revised Statutes, and the somewhat broader enunciation in the Constitution of 1879, have been interpreted to affirm the judicial function of giving the jury the law of the case, and while the right of the jury to determine the issue of fact and law has always been recognized, no decision of this court has ever detracted from the weight due the instructions of the court on questions of law. The statute that preceded, intended, and the organic law, as it stands, intends that the jury shall heed the law as it is given to them by the court. By that is meant, the charge shall have its moral weight with the jury, just as the juror's oath is presumed to exert its influence when he goes into the box. The exposition so often given substantially, that the jury should apply the law as given by the court, and while the jury has the physical power to disregard it, they are morally bound to apply the law as announced by the court, we think is the correct application of the provision of the organic law. Indeed, after the frequent judicial utterances on this subject, the question should be deemed closed. We do not appreciate that the decision in the Spencer case, 45 An. 1, at all conflicts with previous decisions. The jury was instructed in this case they must find the facts, and if any crime results, must apply the law given by the court, but the court also instructed the jury: "A jury can not rightly exercise the physical power of disregarding the instructions of the court upon the law any more than they can rightfully find a verdict directly opposed to the proof of facts." We shall be careful always to see that the legal instructions are correct. Courts of the last resort are not to set aside verdicts, on the form of statement used to announce the trite proposition contained in the organic law that the juries are judges of fact and law, if the substance of the constitutional mandate is observed, and the law, in other respects is correctly stated. We think the charge as given meets the test of the Constitution and our jurisprudence. State vs. Johnson, 30 An. 904; State vs. Ford

et als., 37 An. 448; State vs. Cole, 38 An. 846. This disposes of the exceptions to the judge's charge on this point.

There are exceptions to the charge that to constitute the offence, it was not necessary that a criminal prosecution was actually pending before the grand jury, or that Marshall was actually under a summons to appear, when the alleged persuasion was used. These exceptions virtually affirm that the bribery statute has no operation to punish attempts to bribe or prevent witnesses from testifying, unless there is a criminal case pending, or an investigation actually pending at the moment of the persuasion. This discussion belongs to the consideration of the statute, its scope and purpose.

Our view of the statute will answer this last and other contentions. The statute badly worded and constructed, still presents, we think, the purpose to guard against improper interference with witnesses necessary in criminal prosecutions. Hence the language following the attempt prohibited "to prevent any witness in a criminal case in any of the stages of the prosecution 'to the final trial inclusive,' from making the oath to obtain the arrest from appearing or testifying as a witness." The investigation before the grand jury on indictments laid, or proposed to be laid, before it, is the first and most important phase of the prosecution. The investigation is, of course, in advance of the finding of the indictment. It would, in our opinion, be doing violence to the meaning and language of this statute to hold it has no application to an attempt to prevent a witness, known to be such by the accused, from appearing as a witness in support of an indictment, laid or proposed to be laid before the grand jury. When the indictment is found there is technically a criminal case, and then the argument concedes any attempt to prevent the witness from testifying would be a crime. But the argument insists that until indictment is found, there is no "case," and hence there is no crime in improper appliances to prevent witnesses from appearing. The argument finds its answer in the phrase "all stages of the prosecution" in the statute. The reasoning of the defence gives the protection of the statute to the administration of public justice after the indictment is found, but leaves wide open to the bribe-giver the portals of the grand jury room. Without witnesses there can be no indictments, and the construction of the defence leaves unpunished those who, through bribes or persuasion, seek to defeat the action of the body charged with indicting for crime.

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The motion in arrest presents, in another form, the proposition of the defence, that to constitute the offence there must have been at the time of the persuasion a criminal case or prosecution, or investigation, and it is insisted the indictment does not charge there was any stage of any criminal prosecution, in reference to which Marshall was to be a witness. It is urged, in this connection, too, that the indictment does not follow the statute. Support for this view, it is claimed, is derived from *State vs. Taylor*, 44 An. 967, and *State vs. Tisdale*, 41 An. 838. The first decision is, we think, adverse to a technical construction of the statute. It held that one might be a witness in the sense of the statute, though not summoned. In the other case it was held the indictment need not aver the competency of the witness or materiality of his testimony. The decisions do not, we think, sustain defendant's contention. We have analyzed this statute. It speaks of a witness in any stage of a prosecution. It does not require, as was held in the case of *State vs. Tisdale*, 41 An. 838, that he should have been summoned, nor does the statute imply that at the moment the prosecution should be pending. If the prosecution is in contemplation, and aware that it is about to be begun, a party, with the view to defeat the investigation, approaches one known to be an indispensable witness, and by bribes and persuasion attempts to prevent him from appearing or giving testimony, in our view the crime of guilty persuasion is accomplished. The indictment in this case charges the indictments against the councilmen were about to be preferred; that Marshall was a witness; that accused attempted, by felonious and unjust solicitation, to hinder and prevent him from appearing and testifying as a witness in support of the indictment. We are dealing, it is true, with a statutory offence. We think the indictment sets out substantially the offence. Identical words are not essential. See *State vs. Smith*, 5 An. 340; *State vs. Price*, 37 An. 215, 219; 2 *Gallisonn*, 18. It is enough that the offence prohibited by the statute, is set forth with substantial accuracy, as is the rule announced in the text books and decisions. We think the allegation that indictments were about to be laid before the grand jury may be accepted as equivalent to the averment of a judicial proceeding; the indictment charges Marshall was a witness to support the indictments, and the accused knew it when he approached Marshall. It is claimed that the indictment does not show where the indictment

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was pending. If such express allegation is to be deemed essential, we think the *venue* in the indictment answers the objection. Under our law it is provided that the *venue* in the margin shall be deemed a statement of all the facts stated in the indictments; by another salutary provision objections of this nature must be taken before trial. Revised Statutes, Secs. 1062, 1064. The defendant's counsel have made an able and elaborate argument, which has had our careful attention, to support the alleged objections to this indictment, on the theory it charges, no criminal case or investigation pending, or where pending, or that Marshall was a witness, and that defendant knew of such pendency. We think the indictment is sufficient in these respects.

In supporting the motion in arrest of judgment the defendant insists that the statute does not recognize persuasion as an attempt, punishable as a crime. Persuasion is not the attempt but the means of making the attempt effective. The statute, in our view, punishes attempts by persuasion or other means to prevent witnesses from appearing or testifying. Reason suggests that such attempts should be punished, and the statute announces that purpose. The defendant's construction is that the crime is committed only, when the witness is actually prevented from appearing or testifying. That is, the successful attempt to prevent a witness from testifying is a crime, but the attempt that fails, though marked by all the bad intent, and defeated only by the integrity of the witness who is approached, according to the theory of the defence, is to go unpunished. To apply this theory in this case, if Marshall had been prevented from appearing the accused could have been punished, but because the persuasion of the accused proved futile, therefore his attempt on Marshall's integrity was innocent. In our view, statutes to protect the administration of justice would fall short of their purpose if improper solicitations to witnesses were not punishable, unless the witness succumbed and failed to testify. We can not give that narrow construction to this statute. Reason and the terms of the statute forbid it. We read this statute: "Whoever shall attempt by persuasion or other means to prevent a witness from appearing or testifying shall be sentenced," etc. We have given attention to defendant's argument on this point. We note his reference to the act of 1869, and his view of the logical and grammatical arrangement of the section. We are dealing with this statute as we find it in the

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Revised Statutes, and it must be construed as if it never had been the subject of the enactment of 1869. Our construction is to be according to the natural meaning of words and the legislative purpose. The position of a semicolon or of a comma, may be deemed of minor importance in ascertaining the scope of the statute. The first line of the section places bribery and attempting to bribe a witness on the same footing. The attempt, in the view of the statute, might be by force, threat, intimidation or persuasion. Persuasion may be more effective to enforce the attempt than other means. The statute, hence, makes an offence the attempt by persuasion to prevent a witness from testifying. To disconnect "attempting" with what follows in the section, i. e. by persuasion to prevent, etc., is, we think, to destroy the force of the section and its obvious purpose. We have not discussed all the phases of defendant's argument on this branch of the case. They have had our attention. We hold that the attempt by persuasion to prevent a witness from testifying is an offence under the statute.

Our attention has been directed to the special charges asked for by defendant. In our view they were covered by instructions given. One that the defendant was not tried for bribery or perjury was not calculated to confine the attention to the real charge, but had a tendency to confuse the jury. We think it was rightfully refused.

The case has had our best attention, and our conclusion is there is no error on which this verdict can be reversed.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed.

CONCURRING OPINION.

WATKINS, J. The defendant having been convicted, under Sec. 880 of the Revised Statutes, on the charge of having attempted to hinder and prevent one Charles Marshall from appearing and testifying as a witness in support of certain bills of indictment pending before the grand jury, and sentenced to five years' imprisonment at hard labor in the penitentiary, prosecutes this appeal, relying upon nine bills of exception which were reserved during the progress of the trial.

The one of most importance is that raised on defendant's motion in arrest of judgment which was denied by the trial judge.

The following is the tenor and substance of the motion, viz.:

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That the defendant has been convicted of attempting to prevent, by persuasion, Charles Marshall from appearing and testifying as a witness, whereas Sec. 880 of the Revised Statutes under which the indictment was framed, does not create, recognize or refer to any such crime or offence; "and the said defendant is not charged in said indictment with having by persuasion *prevented* said Charles Marshall from appearing and testifying as a witness."

In other words, that the statute denounces as a crime the *prevention* of a witness from appearing and testifying, and not the *attempt* to prevent such witness from appearing and testifying; and consequently the indictment does not charge an indictable offence known to the law, and therefore the judgment and sentence of the court should be arrested.

The court held the indictment good and sufficient in law, and, in all respects, sufficient to warrant the verdict and judgment pronounced, and defendant's counsel retained a bill of exceptions to the ruling of the judge.

The following is the language of our statute, viz.:

R. S., Sec. 880: "Whoever shall be convicted of bribery, or attempting to bribe any witness, or by any force or threat, or intimidation of any kind, or by persuasion, to prevent any witness in a criminal case, in any stage of the prosecution, from making the oath in any order to obtain a warrant of arrest, to the final trial, inclusive, from appearing or testifying as a witness, shall be sentenced to imprisonment at hard labor in the penitentiary not less than one, nor more than five years."

And the indictment is couched in the language following, viz.:

"The grand jurors of the State of Louisiana duly impaneled and sworn in and for the body of the parish of Orleans, in the name and by the authority of the said State, upon their oath present:

"That one L. O. Desforges, late of the parish of Orleans, well knowing that certain bills of indictment for felony and bribery were intended, and about to be preferred against certain councilmen of the city of New Orleans, who, as such, were municipal officers within the State, and that one Charles Marshall was a material witness in support of such bills of indictment, feloniously and corruptly contriving and intending to impede and obstruct the due course of justice, on the twenty-second day of June, in the year of our Lord one thousand eight hundred and ninety-four, with force and arms, in the

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parish of Orleans aforesaid, and within the jurisdiction of the Criminal District Court for the parish of Orleans, feloniously and corruptly, by felonious and unjust solicitation and persuasion, did feloniously and corruptly attempt to hinder and prevent the said Charles Marshall from appearing and testifying as a witness in support of said bills of indictment so as aforesaid intended to be preferred against the said certain councilmen of the city of New Orleans, who, as such, were municipal officers within the State, contrary to the form of the statute of the State of Louisiana in such cases made and provided, and against the peace and dignity of the same."

Omitting for the present other grounds of objection, the question is whether the statute charges a crime when charging defendant with an *attempt* to hinder and prevent a witness from appearing and testifying in any given case, by persuasion, or otherwise.

Whilst it is not doubted that an "attempt to bribe a witness" is a crime within the terms of the statute, the argument of defendant's counsel is, that an attempt by solicitation or persuasion, to prevent a witness from appearing and testifying, is not a crime which is denounced by the statute.

At first glance, it is noticeable, that the statute is susceptible of such an interpretation, for it declares that "whoever shall be convicted of bribery or attempting to bribe any witness, or by force or threat, or intimidation of any kind, or by persuasion, to prevent any any witness," etc.—the words "any witness" twice occurring, suggesting a division of the text into two distinct paragraphs, separated by a semicolon. And if this be done the word "attempting" would be entirely eliminated from the latter paragraph; and, considering the sense of the whole statute, it might well be divided thus, as the former paragraph would apply to the bribery, or the attempt to bribe a witness, and the latter to the persuasion of a witness not to attend and testify.

This section of the Revised Statutes is but a reproduction of the first section of Act 63 of 1869, *ipseissimis verbis*; but the second section of that act is assisting, in that it makes a similar division of the sense of the statute, as follows, viz:

"That any witness in a criminal proceeding * * * who shall fail to appear or give evidence, when legally required to do so, by reason of being bribed, or persuaded to do so, on conviction," etc.

In *States vs. Tiedale*, 41 An. 338, the defendant was indicted under

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section of Revised Statutes 880, as the defendant is, the charge being that "of having intimidated a witness."

In treating that case we made subdivision of the sense of the statute, as we have just intimated, and separated the two paragraphs by a semi-colon, thus:

"The statute declares that, 'whoever shall be convicted of bribery or attempting to bribe any *witness*; or by any force or threat, or intimidation of any kind, or by persuasion, to prevent any *witness* in a criminal case,' etc. (*Italics as in opinion.*)

To clearly demonstrate that the expression was purposely used, we have only to refer to the following paragraphs of the opinion, viz.:

"That the Legislature intended that any person tampering with, bribing or intimidsting a known witness * * * should be punished," etc. (p. 840).

It further speaks of "the intimidated witness," and of intimidating him and preventing him from testifying as a witness, as accomplished facts (p. 841). No mention is anywhere made of an attempt to intimidate, solicit or persuade the witness.

State vs. Taylor, 44 An. 967, presents a case of an indictment under the first paragraph of Sec. 880, charging the defendant with an attempt to bribe a witness.

These two decisions interpret the statute and suggest its division into two distinct paragraphs, as denoted by the employment of the term "witness" twice.

The only difficulty that is suggested as, in any way, interfering with such subdivision of the section, is the absence of a semicolon. But it is a well established principle of jurisprudence that "punctuation forms no part of a law." It is but the work of a draughtsman, or amanuensis, engrosser, or often of a printer. It is frequently altogether disregarded by courts and judges, and they invariably exercise the function of so punctuating a statute as to effectuate the manifest legislative intent. This is conspicuously true of the Supreme Court; as, for instance, in *United States vs. Isham*, 17 Wallace, 496; *Hammock vs. Farmers' Loan and Trust Co.*, 105 U. S. 77; *United States vs. Lacher*, 184 U. S. 624.

In this last case the court, speaking through the Chief Justice, said:

"For the purpose of arriving at the true meaning of a statute, courts read with such stops as are manifestly required."

This court will adopt that theory as correct, and as one that is often necessary and useful in the interpretation of statutes, so as to avoid giving them a bias not intended by the Legislature.

We are indebted to counsel for the State for the foregoing authorities. *Vide* State vs. Payne, 29 Pac. Rep. 789.

On the foregoing hypothesis the defendant's counsel substantially formulates the following proposition in support of their theory, that an attempt to persuade a witness is not a crime under the statute, viz.:

First—That the statute has two distinct offences in view, (1) the bribery or attempt to bribe a witness; (2) the intimidation or prevention of a witness from attending or testifying.

Second—The employment of the word "witness" twice as indicative of the two different offences.

Third—The employment of the terms "being bribed" and "prevented," in Sec. 881, likewise suggesting the two different offences.

Fourth—The character of the penalty—imprisonment at hard labor—putting the two offences upon the same plane.

Fifth—Imprisonment at hard labor in the penitentiary for a term of five years for an attempt to persuade a witness, being altogether incompatible with other criminal statutes of much graver import.

Generally speaking, under our law, punishable attempts appear to be restricted exclusively to consummated efforts, except cases which, in themselves, involve a breach of the peace; such as aiding or abetting in sending a challenge to fight a duel (R. S. 802); or furnishing tools or implements to assist a prisoner to break jail (R. S., Sec. 864); or attempting to rescue a prisoner after he shall have been arrested (R. S., Sec. 868); or attempting to rob another of money (R. S., Sec. 811); or attempting to set fire to any house (R. S., Sec. 845); or attempting to burn any bridge, shed, etc. (R. S., Sec. 847); or attempting to set fire to or burn any cotton (R. S., Sec. 848); or attempting to bribe any judge (R. S., Sec. 860); or attempting to corrupt or awe jurors (R. S., Sec. 861), and a variety of other attempts, which are enumerated.

To extend the theory of attempts to the persuasion of a witness not to appear and testify, would be an innovation upon criminal nomenclature.

Mr. Wharton states the rule by asking a question, and making answer thus:

"Are solicitations to commit crime independently indictable?"

"They certainly are, as has been seen, when they, in themselves, involve a breach of the public peace, as is the case with challenges to fight, and seditious addresses. They are also indictable when their object is interference with public justice; as when a resistance to the execution of a judicial writ is counselled or perjury is advised; or the escape of a prisoner is encouraged; or the corruption of a public officer is sought, or invited by the officer himself.

"They are indictable, also, when they are in themselves offences against public decency, as in the case with solicitations to commit sodomy; and they are indictable, also, when they constitute accessoryship before the fact.

"But is solicitation indictable when it is not either (1) a substantive indictable offence, as in the instances just named, or (2) a stage toward an independent consummated offence?"

"The better opinion is, that when the solicitation is not in itself a substantive offence, or when there has been no progress made toward the consummation of the independent offence attempted, the question whether the solicitation is by itself the subject of a final prosecution must be answered in the negative. For we would be forced to admit, if we hold that solicitations to criminality are generally indictable, that the propagandists, even in conversation, of agrarian or communistic theories, are liable to criminal prosecutions; and hence the necessary freedom of speech and of the press would be greatly infringed.

"It would be hard, we must agree, if we maintain such general responsibility, to defend, in prosecutions for soliciting crime, the publishers of Byron's 'Don Juan,' of Rousseau's 'Emile,' or of Goethe's 'Elective Affinities.'

"Lord Chesterfield, in his letters to his son, directly advises the latter to form illicit connections with married women; Lord Chesterfield, on the reasoning here contested, would be indictable for solicitation to adultery. Undoubtedly, when such solicitations are so publicly and indecently made as to produce public scandal, they are indictable as nuisances. But to make bare solicitations or allurements indictable as attempts, not only unduly and perilously extends the scope of penal adjudications, but forces on the courts

psychological questions which they are incompetent to decide, and a branch of business which would make them despots of every intellect in the land.

"What human judge can determine that there is such necessary connection between one man's advice and another man's action as to make the former the cause of the latter?

"An attempt, as has been stated, is such an intentional preliminary guilty act as will apparently result, in the usual course of natural events, if not hindered by extraneous causes, in the commission of a deliberate crime.

"But this can not be affirmed of advice given to another, which advice such other person is at full liberty to accept or reject.

"Following such reasoning, several eminent European jurists have declined to regard solicitations as indictable, when there is interposed between the bare solicitation on the one hand, and the proposed illegal act on the other, the resisting will of another person, which other person refuses assent and co-operation." 1 Wharton's Criminal Law, Sec. 179, 1788.

On that theory it was held in *Smith vs. Commonwealth*, 54 Penn. St. 209, that an indictment would not lie for solicitations to commit adultery.

In *Stabler vs. Commonwealth*, 95 Penn. St. 318, it was held "that A's handing to B poison and soliciting him to put it in C's spring, was not an attempt to administer poison under the statute."

In *Cox vs. People*, 82 Illinois, 191, it was held that an indictment would not lie for solicitations to commit incest, and "that the mere effort, by persuasion, to produce a condition of mind consenting to incest, * * * is not an attempt."

But it is contended that an attempt to dissuade a witness from attending a trial and giving his testimony is an indictable offence at common law, and that statement is relied upon as a precedent for a contrary interpretation of the statute under consideration.

But is that statement correct?

Mr. Blackstone says:

"Lastly, to endeavor to dissuade a witness from giving evidence, etc., * * * are high misprisons and contempts of the king's court, and punishable by fine and imprisonment." 4 Black. Com. 126.

And Mr. Bishop says:

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"The precision of our language is promoted by restricting 'misprison' to neglects; and such, it is believed, is the better modern usage." 1 Bishop Crim. Law, Sec. 717.

Mr. Russell says:

"All who endeavor to stifle the truth and prevent the due execution of justice are highly punishable; and therefore the dissuading, or attempting to dissuade, a witness from giving evidence against a person indicted, in an offence at common law, though the person should not succeed." 1 Rus. Crim. 182.

It is noticeable that the author does not state that "attempting to dissuade a witness" was an indictable offence, but "an offence at common law." That it was "highly punishable," but it does not say that it was a criminal act, and, as such, indictable.

Mr. Archibold, under the title of "persons who solicit and incite others to commit offences which are not afterwards completed," says nothing of attempting to persuade a witness. 1 Arch. Cr. Pl. and Pr. 8, and note.

Under the heading of "attempt to commit crime," that author furnishes various illustrations, such as (1) an attempt to provoke another to send a challenge, *Regina vs. Phillips*, 6 East. 464; an attempt to bribe a juror, *Young's case*, 2 East. 14; to attempt to corrupt a judge in a case pending before him, 3 Just. 147; to an attempt by soliciting a servant to steal, *Higgin's case*, 2 East. 5. But nothing is said of attempting to persuade a witness. 1 Arch. Cr. Pl. and Pr. 896, and note.

In Myers' Federal Decisions, under the heading of "miscellaneous offences," is found the following, viz.:

"Section 1247. Attempt. Every attempt, or offer to commit any crime or misdemeanor at common law, or by statute, is not an indictable offence. Only those attempts, or offers to violate laws, are indictable, which, if the attempt were carried into effect, *would invade the very safeguards of social order.*" (Our italics.) 12 Myers' Fed. Dec. page 371, Sec. 1247.

That is all the digest contains on the subject. The American and English Encyclopædia of Law collates no adjudications on the subject.

In treating on the subject of "attempt," in quite an extended article, Mr. Bishop says:

"Some acts are made substantive crimes, not so much on account

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of their inherent evil as of their tendency to promote ulterior mischief. Thus * * * false oaths and affidavits employed in judicial proceedings, preventing the attendance of witnesses, and the like, because they are calculated to prevent public justice," etc. 1 Bish. Cr. Law, Sec. 734.

But that author makes no mention of an attempt to persuade a witness, as a common law offence.

I have made diligent examination of adjudicated cases in other courts of the Union, and find but few of them bearing on the question.

State vs. Carpenter, 20 Vt., presents the case of a witness having been actually persuaded not to attend. In Commonwealth vs. Reynolds, 14 Gray, 89, the court said it was indictable at common law to "dissuade, hinder and prevent a witness from appearing," etc. Citing Regina vs. Wyatt, 2 Ld. Ray, 1191; Regina vs. Bidwell, 1 Dennison, 222; The King vs. Stephenson, 2 East. 363. State vs. Early, 3 Harrington (Del.), 562, presents the case of a witness who had been actually persuaded.

The only *dictum* that tends, in the least, to give support to the contrary contention of the State, is found in an isolated expression of Mr. Wharton, in his treatment of the persuasion of a witness "to give particular testimony, irrespective of the truth, which is to the effect that an attempt to persuade a witness from attending a trial, is not merely a contempt of court, but may be punishable by indictment." 2 Whar. Cr. Law, Sec. 1333.

In support of that *dictum*, the author cites the cases we have collated *supra*; but, as we have shown, they exclusively relate to cases in which persuasion has been successful. Of all the cases cited the only one which bears him out is that of State vs. Ames, 64 Maine, 386, which is strictly *sui generis*, and relates to a witness, in a prosecution for the violation of the liquor law, who was sought to be persuaded away.

To show that this *dictum* is quite exceptional it is sufficient to say that the section quoted (1333) is found under the title of "perjury," and is not found at all in the earlier editions of the author.

Mr. Bishop makes a similar alteration in a recent edition of his treatise on criminal law (Sec. 468), citing the same authorities to which Wharton refers *supra*.

On the foregoing authorities it can be safely affirmed that a mere

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attempt by persuasion to hinder or prevent a witness from attending and giving evidence at a trial was not an indictable offense at common law; only a contempt of court, which was punishable as such.

Let us see in what analogy this alleged offense stands to other punishable attempts in respect of the punishment which is denounced by our statutes.

For instance, murder is punishable with death (R. S. 784), but an attempt to commit murder is punishable with imprisonment at hard labor not exceeding two years. R. S. 792.

Whoever attempts to rescue any prisoner in custody shall suffer fine or imprisonment. R. S., Sec. 866.

Whoever shall attempt to rob from another person any money or other property shall be punishable with imprisonment not less than six months nor more than five years. R. S., Sec. 811.

Whoever shall give, or promise to give, any judge, or other person concerned in the administration of justice, any bribe or reward, shall suffer fine and imprisonment. R. S. 860.

That for every attempt to corrupt or awe jurors in trial of any cause, by menace, threats, giving money, or promise of any pecuniary advantage, or otherwise, shall, on conviction, be fined not less than one hundred dollars, nor more than five hundred dollars, and imprisoned not less than six months, nor more than two years. R. S. 861.

Yet, under the construction that has been placed on Revised Statutes, 880, the defendant has been convicted of the crime of attempting, by persuasion, to prevent the attendance of a witness before the grand jury, which attempt was unsuccessful, and, in this court, he is appellant from a judgment sentencing him to a term of five years' hard labor in the penitentiary.

Taking into consideration the entire scheme of crime and its punishment—both at common law, and under our statutes—can it be reasonably deduced therefrom that it was the evident intention of the Legislature to denounce, in Sec. 880 of the Revised Statutes, an attempt, by persuasion, to prevent a witness attending a trial, as a crime which is punishable with five years' imprisonment at hard labor in the State penitentiary?

In my opinion, both the plain meaning of the statute and a reasonable and just interpretation of it indicate the opposite view.

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It has always been the rule—constantly adhered to in every jurisdiction—that criminal statutes must receive strict interpretation.

In *State vs. King*, 12 An. 598, it was held that “in construing penal statutes courts can not take into view the motives of the law-giver, further than they are expressed in the statute.”

In *State vs. Peters*, 37 An. 780, it is held that criminal statutes can not be extended to cases not included within the clear import of their language, and held Act 64 of 1884 null and void.

In the recent and conspicuous case of *State vs. Gaster*, 45 An. 686, this court said :

“All crimes in Louisiana are statutory, and there can be no crime which is not defined and denounced by statute.”

Again :

“The twenty-third section of the act of 1805, authorized a reference to the common law of England for the definition of particular crimes therein enumerated, but neither that nor any other law of the State has authorized reference to that system in order to ascertain the definition of any other crime not enumerated.”

And the court held that there was, under our law, no such crime as a “misdemeanor in the execution of an office,” and abated the indictment, holding that R. S., Sec. 869 was null and void.

This is precisely what we are called upon to decide in reference to R. S., Sec. 880, in so far as the charge of the indictment against the defendant is concerned.

And my appreciation of the statute leads to that end.

Entertaining this view, I concur in the decree.

ON APPLICATION FOR REHEARING.

McENERY, J. The argument on the rehearing insists that the testimony of Marshall, not embracing the conversation between him and the accused, should not have been admitted, and that the court misconceived the defendant's exception to the testimony. The testimony of Marshall, the subject of defendant's exception, relates to what transpired between him and the indicted councilman prior to the conversation. In the conversation it is in evidence Marshall stated he would have to tell all he knew that passed between him, the accused and the councilmen. The suppression of what he knew was the object of the persuasion of the accused, and it is defendant's contention that what he knew, derived from what passed be-

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tween him and the parties named, should not have gone to the jury. The court was fully cognizant of the relation Marshall's entire testimony bore to the charge against the accused, but that portion deemed inadmissible has had our full consideration on the rehearing.

The witness had testified that in the conversation with the accused, on the night of the 22d of June, 1894, reference was made to the rumored grand jury investigation; that Marshall was to be summoned, and the accused had asked him if he could not go away to keep from appearing as a witness. The ordinance and "bargain" were mentioned, which, in the light of the testimony, was the basis of the charge against the councilmen of soliciting a bribe for the passage of the ordinance. Further along in the conversation it appears, in answer to the question of the accused what Marshall would have to say before the grand jury, he stated he would have to tell all he knew that passed between himself and the accused, and on being asked "in reference to what," answered it was understood. Up to this point there had been and could be no objection by the defence. The jury had derived the information that the approaching investigation had reference to Haley and Caulfield, the councilmen; that Marshall had knowledge of the facts on which the charges were based, and that what he knew on the subject "and would have to tell," it was the design of the persuasion charged on the accused to suppress. What he did know, it would seem, was pertinent to go to the jury along with the other testimony. But precisely at this point the defendant objected to the testimony. The charge against the accused was the persuasion to prevent Marshall from testifying before the grand jury—*i. e.*, telling "what he knew." His knowledge on the subject had been alluded to in the testimony given, and we think that the State had the right to prove "what he knew," in order that the jury might appreciate the significance of that testimony already received. The contention of the defence is that after the testimony had reached the verge of disclosing to the jury the knowledge of Marshall, that the disclosure should have been prevented, leaving the jury to conjectures as to a fact of importance in the case. If Marshall had no knowledge, that circumstance would have had weight in estimating the motive for the persuasion. If, on the other hand, he had the knowledge to support the indictment against the alderman, and the accused, knowing that Marshall was the important witness, attempted the persuasion "he should go away and not

testify," then Marshall's knowledge was an essential link in the evidence of the intent and guilt of the accused.

A witness is one who is cognizant or has knowledge of the fact. Webster's Dictionary. The indictment charged that Marshall was a witness to support the indictments against the councilmen. Marshall in testifying to that which passed between himself, the accused and the councilmen, was simply proving his knowledge of the facts on which the indictments rested, and thus the State was maintaining by testimony essential to the indictment that Marshall was a witness. In the original brief for defendants it is conceded that it was competent for the State to show Marshall was a witness in the sense he had knowledge of the facts charged in the indictments, but it is said it was irrelevant and immaterial to show how far that knowledge extended, because the statute makes no distinction between the material witness or otherwise. The concession is unavoidable, but the distinction it draws is impracticable.

Relevant testimony is that tending to show the offence and the intent, and even collateral facts may be given in evidence when of a kind to furnish the basis for the conclusion of the jury. 1 Greenleaf on Evidence, Secs. 51, 52, 448. The testimony objected to is within the rule of relevancy as it is found in the text books and applied in the administration of justice.

The defendant insists that the testimony was calculated to leave the impression on the minds of the jury that the accused was tried on the charges against the councilmen; was designed by the State to exert an improper influence and did operate to the serious prejudice of the accused. The only test this court can apply is that of relevancy. We have examined it under that test. It was offered for the purpose only for which we hold it admissible. The charge of the court restricted it to that purpose and directed the jury to consider it only for that purpose.

On the other points made on the rehearing in relation to the admission of testimony and the charge of the lower court, this court, on full consideration, adheres to the views in the original opinion.

We have also considered, with the attention it deserves, the argument in the briefs and at the bar on the question of the construction of the statutes. We are sensible courts can not, on the theory of mischief intended to be prohibited, enlarge statutes beyond the fair significance of the language employed. But we think another rule

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of interpretation has its application in this case, that the statute must have a construction consistent with its terms and commensurate with its manifest object. It is said our construction strikes out that part of the section that reads "in any of the stages of the prosecution, from making the oath to obtain the arrest to the final trial, inclusive." By this we infer is meant that the stages of the prosecution are comprehended between the making the oath to obtain the arrest and the final trial. We think the "stages" of the prosecution include the investigation by the grand jury which results in finding the bill. Hence, if the persuasion is used to prevent the witness from going before the grand jury, the investigation before that body is a stage of the prosecution in the sense of the statute. We have also covered again the contention that there is no case until the law is put in motion. By this we understand is meant that under the statute punishing an attempt to prevent any witness in a criminal case from testifying, the attempt to be within the statute must be after indictment, until which there is no case, and hence no offence. We think that if the attempt is to prevent that witness from testifying in a contemplated investigation before the grand jury, resulting in the finding of the indictment, the offence is accomplished though the case, in its technical sense, does not exist until the indictment is found. When that occurs the case may be deemed to relate back to the initial step, the grand jury investigation. The question is one of appreciation of the statute. We have considered the authorities cited in defendant's brief, supposed by analogy to relate to the subject. It seems to us, on the maturest consideration, the construction we adopt is supported by the statute, and certainly by the motive presumably actuating the legislator.

The rehearing is refused.

 No. 11,648.

WILLIAM G. VINCENT VS. MRS. CAMILLA M. PHILLIPS.

The parties to the suit in the lower court are parties to the appeal, and, therefore, the motion to dismiss the appeal, in so far as relates to that ground, is dismissed.

The case itself is not dismissed, but remanded, in order that the third person, who has petitioned for an appeal, may prove the amount of the indebtedness of the defendant, and whether the succession, represented by the defendant, is solvent or insolvent.

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Vincent vs. Phillips.

A PPEAL from the Fourteenth Judicial District Court for the Parish of Pointe Coupee. *Talbot, J.*

Wm. W. Leake and Branch K. Miller for Plaintiff, Appellee.

Dinkelspiel & Hart and *Yoist & Claiborne* for Metropolitan Bank, Appellant.

Opinion handed down, January 2, 1895.

The opinion of the court was delivered by

BREAUX, J. The appellant, the Metropolitan Bank, a third person, alleging that it is the holder and owner of two promissory notes—one for one thousand nine hundred and fifty dollars, and the other for two thousand and sixty-two dollars and eighty-five cents—complains of a judgment rendered in favor of the plaintiff against the defendant, dissolving an act of sale for the non-payment of the price, and placing him in possession of the property, and urges that the effect of the judgment reduces the succession, its debtor, to insolvency. The appeal was taken by petition and citation, and plaintiff and defendant were made parties.

The appellant interposes an assignment of errors, covering a number of assignments.

The plaintiff moves to dismiss the appeal on the grounds:

That all the parties to the judgment appealed from have not been cited, or made parties.

That the appellant does not allege or show a direct pecuniary interest in an amount sufficient to give jurisdiction to this court.

The only parties to the judgment are the plaintiff and the defendant.

As between these two (the plaintiff and the defendant) the plaintiff was decreed to pay the amount of six hundred dollars to the electric light company.

The electric light company is not a party to the record in any respect whatever, and has never consented to this decree.

The record does not disclose that that company is a party to the suit, interested in maintaining the judgment appealed from.

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The second ground, denying in effect, at least, appellant's pecuniary interest, is more serious.

The claim has not been established in the court below.

Although the exception does not contain a denial direct of indebtedness, it is so worded that the indebtedness is an issue in so far, at least, as relates to jurisdiction.

The appellant is also confronted with the objection that there is no proof of record that the estate of Marshall P. Phillips is insolvent.

The right of appeal is based on the amount of the notes alleged, and on the fact that the succession is insolvent.

Without proof of these allegations the appellant has no interest enabling him to sustain his appeal.

The appellant, to have his grounds of assignment decided, must show that he has a pecuniary interest, and that he has been aggrieved by the judgment.

The case must be remanded to ascertain whether the Metropolitan Bank has an interest in the matter in dispute.

The two questions to be tried by the court below are: the amount of the indebtedness of the legal representative of the succession of Marshall P. Phillips to the Metropolitan Bank, and whether his succession is solvent or insolvent.

It is therefore ordered, adjudged and decreed that the case be remanded to try and decide the two issues, defendant's indebtedness and the insolvency of the succession of Marshall P. Phillips.

The costs to await the final determination of the appeal.

No. 11,841.

W. S. BARNES FOR THOMAS L. BARNES VS. SHREVEPORT CITY RAILROAD COMPANY.

Under three years of age a child is *prima facie* incapable of contributory fault. Although a child may be in a public highway through the fault or negligence of its parents, and so be improperly there, yet if he be injured through the negligence of the defendant he is not precluded from his redress. If the defendant knows that such a person is in the highway, he is bound to a proportionate degree of watchfulness—to the utmost circumspection. And what would be but ordinary neglect in regard to one whom he had supposed to be a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger.

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Barnes vs. Railroad Co

It is the duty of the driver of a street car, not only to see that the railroad track is clear, but also to exercise constant watchfulness and care for persons who may be approaching the track.

It is a correct charge to a jury to say that a car driver "can be justly charged with negligence only when he fails to observe or do something he ought to have seen or done, and would have noticed or done with ordinary vigilance; when he fails to be prepared for something visible, or, at least, of probable occurrence, or that might be reasonably expected to happen."

A PPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

T. F. Bell and E. H. Randolph for Plaintiff, Appellee:

A child under three years of age can not be guilty of contributory negligence. 42 An. 831; 48 An. 68; *Harris, Damages by Corporations*, Vol. 1, p. 544.

Nor can the negligence of the parent be imputed to the child in a suit by the child. *Id.*

Parents are not obliged to restrain their children within doors at their peril. *Id.*

A person traveling on or crossing a street railway track is not a trespasser. *Thompson on Negligence*, Vol. 1, p. 396.

The failure of the defendant railroad company to introduce the testimony of its employees, who were on the train at the time of the accident, if within reach of the court, raises a presumption of negligence against the company. *Thompson on Negligence*, Vol. 1, p. 514; 35 An. 694; 38 An. 777; 41 An. 866.

Wise & Herndon for Defendants, Appellants, cite: 36 An. 750; 37 An. 288.

Argued and submitted, June 8, 1895.

Opinion handed down, June 21, 1895.

Rehearing refused, June 29, 1895.

The opinion of the court was delivered by

WATKINS, J. This suit is for the recovery of ten thousand dollars damages against the defendant for injuries^s sustained by the plaintiff's infant child of three years of age, it being run over by one of defendants' street cars, which was operated by electricity, and its

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arm so broken and crushed that it had to be amputated, leaving it in a permanently crippled condition.

The statement of the petition is that the accident occurred at the intersection of Texas and Crocket streets, in the city of Shreveport, defendants' car being at the time operated on Texas street in carrying passengers. That at the time of the occurrence plaintiff's child was standing at or near the railroad track, where there is a curve or turn, thus being in a position in which the motorman operating the car could have easily seen it had he been at his proper place and carefully attending to his duties. That the accident was occasioned by the gross carelessness and negligence on the part of the railroad company, its servants, agents and employees. That the injury inflicted upon the child caused it great pain and suffering, and resulted in its being maimed and disfigured for life.

The defendants' answer is a general denial, coupled with the plea of contributory negligence on the part of the child and its parents.

The cause was tried by a jury, who rendered a verdict in favor of the plaintiff for three thousand dollars, and from the judgment of the court thereon based, the defendant has appealed. In this court the plaintiff and appellee filed an answer to the appeal and demands an amendment of the decree so as to award him the full amount claimed in his petition.

The testimony of all the witnesses concurs as to the following established facts, viz.: That the accident happened in open daylight, while the car was slowly moving down grade of its own weight and momentum, the electric current having been cut off; that the track and car were in apparently good order, and the motorman in charge of the car was a sober, prudent and experienced employee; that not one of the several passengers who were in the car at the time either saw or knew of the happening of the accident.

One witness states that as he was entering the car he saw the car strike the child, but that he did not notice what the motorman was doing at the time. Another witness states that as he came to the car, he saw it just as it was checking up, and just then the little boy rolled out from under it.

A physician from the Charity Hospital testifies that he was a passenger on the car on the morning of the occurrence, and the substance of his statement is as follows:

That he was sitting near the fare-box when a passenger came in

and spoke to him, handing a quarter of a dollar to the motorman to make change so he could deposit his fare in the fare-box. Heard the passenger ask the motorman for change, and saw the motorman give him the change. That just as he gave him the change witness observed the motorman apply the brake in a rather excited manner; and soon afterwards all the passengers became excited and stood up—the witness among the number. That just about that time he heard a little child scream, and looking out of the window he saw a little fellow holding his arm in his hand. That he ran out quickly and caught hold of the arm to prevent a hemorrhage. That upon learning whose child it was he directed that he be at once carried home; and that he went there also, and applied a bandage on the broken limb, and just as speedily as possible telephoned to the hospital for his instruments and amputated it. That he amputated it just about the junction of the upper and middle third, just above the elbow. That the arm was crushed above the elbow, and there was no such thing as saving the arm—amputation being absolutely necessary.

Another witness corroborates the physician's statement with reference to the motorman giving a passenger change about the moment of the occurrence. He heard the cry of alarm made by some passengers, and saw the motorman catch hold of his brake "as quickly as possible" and try to stop the car, "but it was a little too late to stop the car." He states that there was no conductor on the car; and defendant's cars are not provided with conductors—the double duty being, by the company's regulations, imposed on the motorman of handling the car and making change for the passengers. He says that when the car is in motion, the motorman's post of duty is on the front platform of the car, and that he occupies a position so he can look on either side.

That the car is provided with a brake on the front platform, so that he can arrest the speed of the car; and also with an apparatus so that he can cut off and turn on the electric current at will. He says that, at the place where the accident occurred, there is a switch, and the car passes slightly down-grade from the switch to the main line; and that in thus passing off of the switch it is customary for the motorman to slow up by cutting off the current and permitting the car to run down of its own *momentum*.

Another witness who had a seat in the car by the side of the physician who testified, gives much the same relation of facts as the lat-

ter did. He speaks of the passenger who came in and walked up to the motorman to get change to pay his fare. He states that "the motorman turned around to make the change for him about the time (the car) was going out of the switch." That it had gone probably fifteen or twenty feet (while) he was making change; and he turned partially around so as to make the change for the passenger. That immediately after having received his change, the passenger made some remark and the motorman commenced turning his brake to stop the car.

Another witness, standing at a blacksmith shop near the switch, saw the car just as it came in contact with the child and push him over. He ran to the child immediately and picked him up and carried him into his father's house, which was near by.

Another witness, who was driving his cart, states that he was in the rear of the car, about thirty feet distant, and a little to the left of it, driving in the same direction in which the car was moving, and saw the accident. Saw the car just as it was checking up, and the little boy rolling out from under it.

The passenger who was obtaining change from the motorman for the purpose of paying his fare, states that he was standing at the front door when the accident occurred. He says that while the motorman was engaged in making change for him the little boy was standing outside of the railroad track—possibly at a distance of three to six feet. That when the car was within three feet of the child, he took a notion to run across the track to the other children who were on the opposite side, and came in collision with the car.

There were five or six children playing on the track before the car had reached the point where the accident happened; but they had moved on upon the approach of the car, separating from the little fellow who was run over. That, as he observed the movement of the little boy, he caught at the brake, and the motorman caught it at that instant and checked the car. That he thinks the motorman saw the child just about the time he started, but he did not have sufficient time to stop the car—it was too late.

The foregoing is a fair summary of all the testimony which was adduced on the trial in favor of the plaintiff, and nothing to the contrary was developed by the witnesses for the defendant.

It is a noteworthy fact that the motorman, White, who was operating the car which inflicted the injury, was neither summoned nor

interrogated as a witness for the defendant, notwithstanding he was known to have been in the adjoining parish at the time of the trial, he being no longer in the service of the company.

Following a general rule which has ever been in favor with this court, we feel at liberty to presume that if he had been produced as a witness by the defendant, his evidence would have been averse to its pretensions.

Having been the motorman who had charge of the car, and through whose carelessness and negligence the accident and injury happened, it was defendants' duty to have placed him on the stand and purged him of his fault, if indeed he could have done so, and as he was neither produced nor interrogated, all the legal presumptions are unfavorable to his testimony.

Imprimis we may dispose of the defendant's charge of contributory negligence, in respect to the child, by observing that it was only three years old and incapable, *per se*, of contributory fault; and in respect to that of the parents there is no proof of contributory fault of any kind. *Westerfield vs. Levis Bros.*, 43 An. 63.

Mr. Thompson states the rule thus pertinently, viz.:

"Although a child of tender years may be in the highway through the fault or negligence of its parents, and so be improperly there, yet if he be injured through the negligence of the defendant, he is not precluded from his redress. If the defendant knows that such a person is in the highway, he is bound to a proportionate degree of watchfulness, to the *utmost circumspection*, and what would be but ordinary neglect in regard to one whom he supposed to be a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger." 2 Thompson on Negligence, 1129.

The same author says:

"It is the duty of the driver of street cars not only to see that the railroad track is clear, but also to exercise a constant watchfulness for persons who may be approaching the track." 1 Thompson on Negligence, 398.

But in even clearer and more cogent terms Mr. Beach states the rule thus:

"If, however, he" (the engineer or driver) "sees a child of tender years upon the track, or any person known to him to be, or from his own experience giving him good reason to believe that he

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is insane, or badly intoxicated, or otherwise insensible to danger. or unable to avoid it, he has no right to presume that he will get out of the way, but should act on the belief that he might not, or would not, and should therefore take means to stop his train in time." Beach on Contributory Negligence, 395.

Defendant invokes the rule as announced in *Gallagher vs. Railroad Company*, 37 An. 288, to the effect that "a car driver can be justly charged with negligence only when he fails to observe or do something he ought to have seen or done, and would notice or do with ordinary vigilance; when he fails to be prepared for something visible, or at least of probable occurrence, or that might be reasonably expected of him.

"If the accident happened from a sudden and unanticipated act, which is the result of the thoughtless impulse of a child, of which human forethought could not be prescient, no liability attaches to the driver or to his employer."

The rule thus formulated is undeniably correct, and does not differ from the rule we have quoted from Thompson and Beach. But is this one such a case? Evidently not. For instead of the motorman of defendant's car being on the lookout while his car was slowly descending the switch to the main track, propelled by its own momentum, he was engaged in making change for a passenger; and, in consequence of his attention having been thus diverted, he failed to observe the perilous situation of the child in time to arrest the progress of the car, and prevent the happening of the untoward event. It seems quite apparent to us that if the motorman had postponed making change for the passenger until his car had passed off the switch, he could, and most likely would, have seen the child, and averted the accident.

The judge *a quo*, in his charge to the jury, very correctly said:

"A railway company is bound to keep a proper lookout, especially in populous localities, for objects on its tracks ahead of a moving train, and if a child is seen thereon it should bring its train to a stop; and upon its failure to do so, it is chargeable with actionable negligence.

"The same rule applies to an electric car company, and in case of children of tender age, the proper inquiry is, whether the person in charge of the motor car failed to observe, or do something which he

ought to have seen or done, and which he would have seen or done with ordinary vigilance.”

This charge, in our view, is in strict keeping with the rule that is announced by authors and jurists, and that the jury were evidently mindful of the judge's instructions in rendering a verdict in favor of the plaintiff. We think a case of damages is made out by the law and the evidence, but our opinion is that the allowance made by the jury is not enough, and that it should be increased to five thousand dollars.

It is therefore ordered that the amount of damages be increased to five thousand dollars, and as thus amended the judgment be affirmed.

NICHOLLS, C. J., absent.

No. 11,803.

STATE OF LOUISIANA VS. BUTLER JOHNSON ET ALS.

Order for Subpoena to Issue.—The order of the trial judge for a subpoena to issue to summon a witness is not a conclusive step in the case which prevents him, before the return of the summons, from ruling for cause sufficient that the accused must make affidavit of the materiality of the evidence in order to delay the trial at the calling of the case for trial.

Continuance.—The refusal of a continuance by a trial judge, is in general, not reviewable.

Corroborating a Witness.—Where an attempt is directly made to impeach a witness on his cross-examination, he may be corroborated although not impeached by extraneous evidence.

Confessions.—The confession was admissible against the accused, by whom it was made.

It does not necessarily follow, because an accused is under arrest, that his confession is not free and voluntary.

Instructions must go to the jury that confessions affect only the accused who confessed.

After the alleged crime had been committed, statements against co-defendants are not admissible.

The accused is entitled to his exculpatory with inculpatory statements before the jury. All the statements are admissible, and the jury act upon such part as to them seems true, and reject the rest.

Examination of a Witness Who Does Not Remember.—A witness who states that he does not remember whether he made certain statements to persons named, may yet be impeached by proof that he did make the statements as charged, which he affected not to recall.

The motion for new trial, reiterating grounds set forth in the bills of exception, overruled.

47	1225
48	276
47	1225
50	1314
47	1225
53	118
47	1225
116	528

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The effect of the confession not having been restricted to the accused, by whom made, the verdict and judgment of the court is affirmed as to Ed. Clifton, the accused who confessed, and avoided and reversed as to the others; the case as to these is remanded for a new trial.

APPEAL from the Fourth Judicial District Court for the Parish of Grant. *Wear, J.*

M. J. Cunningham, Attorney General, and *R. E. Milling*, District Attorney, for State, Appellee.

Henry Bernstein and *John A. Williams*, for Defendants, Appellants.

Argued and submitted, May 11, 1895.

Opinion handed down, May 20, 1895.

Rehearing refused, June 8, 1895, as to Clifton, June 29, 1895, as to the State.

The opinion of the court was delivered by

BREAUX, J. Butler Johnson, George Milligan and Edward Clifton were charged with robbery and convicted.

The last named was sentenced to the penitentiary during three years, the others five years.

They appeal from the verdict and sentence, and rely upon six bills of exception.

They interposed a motion for a new trial on the ground that the verdict was contrary to the law and the evidence.

The accused complain of the refusal of the trial judge to grant them a continuance on account of the absence of a witness.

ORDER TO SUMMON A WITNESS IN ANOTHER PARISH.

The motion for a continuance was preceded by an application for a *subpœna* on the 21st of March, to the sheriff of another parish, to summon the witness for the trial fixed on the 27th day of March, 1895. The case was continued and tried on the 2d day of April.

The defendants urge that having granted the order for the *subpœna*, the District Judge should not have forced them to make affidavit for a continuance before giving time for the return of the *subpœna*.

The trial judge's statement is that at the time of the application for an order to summon the witnesses he informed counsel that granting the order would not necessarily entitle the accused to a continuance, and that he understood counsel to state that the case would not be delayed. He then signed the order to summon the witnesses, but that counsel said that he was misunderstood by the trial judge. The latter admits that he, possibly, misunderstood counsel. It was none the less, he states, with him the controlling reason in granting the order.

With reference to the other ground contained in this bill, that relating to a continuance, he states that as the sole purpose in seeking the testimony of the witness was to impeach the character of one of the witnesses for the State; he refused the continuance.

On the 28th day of March the sheriff of the parish of Ouachita, to whom the *subpœna* had been sent to summon the witness, mailed a postal card, informing the Clerk of Court of Grant that as he had not received any instructions as to the witness, whether white or colored, his employment and other needful information; he had been unable to find him. This postal card was received on the 1st of April. Upon this state of facts, no cause suggests itself to justify us in annulling the verdict of the jury and remanding the case for another trial.

The delay that intervened between the issuance of the *subpœna* and the day of the trial, the failure to furnish instructions to assist the sheriff to whom it was addressed, and the reasons assigned by the trial judge sustain the correctness of the ruling under which the accused was compelled to make an affidavit for a continuance.

THE REFUSAL TO POSTPONE TRIAL.

With reference to the continuance, which was refused, applied for on account of the absence of the witness for whom a summons had issued, we do not think that the ruling gives ground for reversal on appeal.

The testimony sought was for the purpose of discrediting a witness for the State, by proving that his reputation for truth and veracity was bad.

Although he was a stranger in the community, and even if he was a "tramp," as alleged by the accused, it does seem to us that reasonable time was allowed to procure the presence of the witness.

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In an early case in our jurisprudence it was decided that a "continuance will not be granted on defendant's affidavit, however strong, if there exist suspicious circumstances, not accounted for, and of such character as to warrant the inference that the application is made for delay merely." *Territory vs. Nugent*, 1 M. 109.

More recently it was decided "that it is in the discretion of the court, even where the materiality of the expected evidence is set forth in the affidavit, to refuse a continuance if it should appear that the defendant's sole object is delay." *State vs. White*, 7 An. 531.

In matter of continuance, the District Judge is entrusted with broad discretion, and his refusal to grant it is seldom reviewable. *State vs. Long*, 4 An. 441; *State vs. Fulford*, 33 An. 679; *State vs. Fisher*, *Ib.* 1344.

PROPER FOUNDATION TO IMPEACH WITNESS NOT LAID.

This brings us to a consideration of the bill of exceptions to the refusal of the court to permit the defendants to ask a witness, W. B. Teagle, if State witness Day had not made contradictory statements relative to a pistol of which he testified he had been robbed.

The court states that the testimony was not admitted for the reason that the defendant did not lay a proper foundation by asking the witness if he had made the contradictory statement.

The foundation is generally held necessary in case of verbal statements. There was no error in the ruling excluding the testimony. *State vs. Johnson*, 35 An. 871; *Greenleaf*, Sec. 462.

UPON CROSS-EXAMINATION AN ATTEMPT WAS MADE TO IMPEACH WITNESS—CORROBORATION PERMISSIBLE.

The third bill of exception relates to the statements of the prosecuting witness, made some fifteen or twenty minutes after the crime had been committed, and near the place it was committed.

In the matter of ruling on this point, the trial judge states that on cross-examination of this prosecuting witness, Day, the defendant attempted to show that he had been in the habit of going to places and pretending that he, Day, had been robbed, that he might excite some feeling and get contributions from a sympathetic public; that it was with him a game for money, thereby impeaching the testimony, and that, moreover, he admitted the testimony as part of the *res gestæ*.

It is urged, on the part of the defence, that the court could not admit the evidence in anticipation of an attack upon the veracity of the witness, and that the fact of asking the witness impeaching questions would not be such attack within the contemplation of the law.

A party has the right to introduce evidence in corroboration of a witness who has been impeached or contradicted on *his own cross-examination*, and although he has *not been impeached* by extraneous evidence. Law of Witnesses, Rapeljé, Sec. 217, p. 360; Starkie on Ev. 180, 5th Edition.

We pass the question of *res gestæ* without comment, as we think the testimony was admissible upon the ground decided.

SURPRISE OCCASIONED BY INCONSISTENCY OF WITNESS.—PARTY CALLING, NOT AT HIS MERCY.

The fourth bill of exception sets forth defendant's complaint to a ruling permitting the prosecuting officer to ask a witness for the State whether or not he had made different statements out of court to certain persons named.

The trial judge says, in support of his ruling:

"If the District Attorney was taken by surprise, as he evidently was, he not only had the right to ask the questions, but to introduce proof of these statements."

It is a well-settled rule that one calling a witness is not absolutely bound by his testimony.

Here there was surprise, and there was in consequence no error in permitting the prosecuting officer, at any time during his examination, to ask witness if he had not stated the facts differently. A line of examination permissible only in case the witness, by his conduct or utterances, has grossly mislead the party by whom he was called.

The following authorities and text writers sustain the ruling: State vs. Simon, 37 An. 569; State vs. Clark, 38 An. 105; Whart. Cr. Ev., Secs. 482, 883, 484; 1 Green. Ev., Secs. 449, 462.

CONFESSIONS AFFECT ONLY THE PARTY MAKING THEM.

The defendants, in their fifth bill of exception, complain of the trial judge's ruling permitting the prosecuting officer to prove that one of the accused, Clifton, had made a confession.

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The grounds of complaint are, that the confession was not free and voluntary; that it was not made in the presence of the other accused; that it was some time after the alleged crime had been committed; that it was not a confession, but, on the contrary, a positive denial of guilt; and, lastly, that it was not admissible to prove an independent or extraneous fact.

The accused was under arrest when he chose to make statements regarding the crime charged, but he was not in any manner threatened, nor were promises of any kind made to him or the least influence exerted.

The mere fact that an accused is under arrest is not cause to exclude statements admitting his guilt.

The objections urged by the other accused that the alleged confession was made after the crime had been committed, presents greater difficulty. The purpose of the conspiracy having been accomplished, the statements then and there made were not admissible against co-defendants. When the common enterprise is at an end no confession was admissible against any but himself. *State vs. Jackson*, 29 An. 354; *State vs. Buchanan*, 25 An. 89; 2 Bishop C. P., par. 230; *Wharton Crim. Ev.*, par. 699.

The record does not disclose that the trial judge instructed the jury that the declarations in question were not admissible against the other defendants.

Under instruction of the court to the jury that the evidence was admissible only against the accused, who had made the statements, the testimony was admissible.

Without that instruction and without limiting it at all, it was error to admit the confession against all the defendants. As a confession against Clifton, it was admissible.

"As this testimony was not used against her, under the instructions of the District Judge, she can not complain. She urges that it had an effect on the jury. But we must presume that the jury followed the instructions of the court." *State vs. Harris & Nellum*, 27 An. 572, 573.

Here no such instruction was given to the jury, and the case will have to be remanded for new trial as to Johnson and Milligan.

With regard to the confession of Clifton, the following is supported by a number of decisions:

"The defendant is entitled to have all he said on the one occasion,

the exculpatory with the inculpatory statements produced before the jury; yet they may believe and act upon such part as to them seems true, and reject the rest." Bishop on C. P., par. 1241.

Separate and subsequent assertions of innocence are not admissible, but exculpatory statements made in a confession may go to the jury with those statements proving guilt.

We do not think that the accused, Clifton, has any ground of complaint before this court. As a question of fact, the jury considered the exculpatory and inculpatory evidence, and found him guilty.

Having had the benefit of the former, he can not urge its admission as evidence of an error of the trial judge.

A WITNESS WHO DOES NOT REMEMBER—QUESTION PROPOUNDED TO IMPEACH.

The sixth and last bill of exception sets forth that the court erred in permitting the prosecuting officer to propound impeaching questions to one of defendant's witnesses, without, the defendant urges, having previously laid a proper basis.

In answer to these questions, the witness stated that he did not remember having related certain facts mentioned to him to persons named by the prosecuting officer.

As the witness did not positively deny that he had made such statements, it is urged that he could not be impeached.

In an English case, *Crowley vs. Page*, Parke B. observed: Evidence is admissible to prove that the witness did say what is imputed (although he says he does not recollect), always supposing the statement to be relevant to the matter at issue. If such were not the rule, a witness who says he did not remember could never be contradicted.

Mr. Rapalje, in his work on the Law of Witnesses, Par. 204, commends that ruling:

"It is true, the proof of the statement imputed to the witness, which he says he does not remember to have made, is not admissible as a contradictory statement, for until further inquiry be made, there is no apparent contradiction, but still it seems the evidence should be admitted, for the imputed statement, when proved, may be such as to amount to a direct contradiction of the witness, and may also possibly convince the jury that the witness did not speak the truth in saying he did not remember making the statement. If

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the rule were otherwise, it might happen that under the pretence of not remembering, a witness who has made a false statement, and who knows it to be false, would escape contradiction and exposure."

If the testimony was negative, or did not prove anything at all, as in case of *State vs. Chevallier*, 36 An. 81, and the question was propounded only to delay and embarrass the trial, it should not be permitted.

If, however, the witness does not recollect, proof of the statement should be admitted, when it is equivalent to a contradiction.

The motion for a new trial sets forth no grounds not heretofore passed upon in deciding points brought up in the bills of exception. It is therefore overruled.

It is therefore ordered, adjudged and decreed that the verdict, sentence and judgment of the court *a qua* is affirmed in so far as relates to Ed. Clifton.

It is ordered and decreed that, in so far as relates to Butler Johnson and George Milligan, the verdict, sentence and judgment are annulled, avoided and reversed, and the case as to these, Butler Johnson and George Milligan, is remanded to the District Court for a new trial, in accordance with the views herein expressed.

No. 11,754.

47 1232
50 1297

DWYER BROS. VS. ADMINISTRATORS OF THE TULANE EDUCATIONAL FUND.

Where there is an acknowledged inability on the part of the defendant to execute the contract, the putting of him in default is not necessary as a prerequisite to a suit for damages for a violation of the contract.

Under a claim for damages under Art. 1934, C. C., the damage must be the natural and proximate result of the wrong. It must not be remote or consequential, but the natural consequence. Vague and indefinite results, remote and consequential, etc., and thus uncertain, are not embraced in the compensation given by damages.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Omer Villeré for Plaintiffs, Appellees:

Cites 8 La. 519; 7 M. 218; 2 An. 589; 18 L. 510; 15 An. 247; 39 An. 589; C. N. 1146; 9 La. 174; 9 R. 377; 42 An. 230; 3 R. 357; 36

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An. 425; C. C. 1933, 1926, 1930, 1934; 16 Laurent, 305, 314, 320; 4 Marcadé, Sec. 515; 1 Laromblère, 522; 10 Durantou, 447; 24 Demolombe, Secs. 530, 543, 545, 539; 4 Aubry and Rau. 95.

Harry H. Hall for Defendants, Appellants:

Cites C. C. 1933, 1911, 1912; Laurent, Vol. 16, p. 320; 6 N. S. 229; 2 R. 498; 10 R. 524; 6 R. 450; 9 R. 500; 8 R. 161; 2 R. 162; 7 La. 193; 18 La. 88; 8 La. 98; 14 La. 81; 11 An. 301; 13 La. 229; 1 La. 98; 5 La. 416; 36 An. 1126; 37 An. 661; 37 An. 492; 20 An. 291; 37 An. 835; 3 An. 235, 104; 6 An. 293, 491; 17 An. 240; 28 An. 778; 13 An. 564; 29 An. 287; 4 An. 248.

Argued and submitted, April 23, 1895.

Opinion handed down, May 6, 1895.

Rehearing refused, June 29, 1895.

The opinion of the court was delivered by

McENERY, J. The plaintiffs, who are wholesale dealers in miscellaneous articles of merchandise, conducted their business at No. 52 Canal, 71 Common street and 12 Magazine. These several places were connected and open, affording a continuous floor space.

The plaintiffs are, as the record shows, enterprising merchants, whose business increased with almost unprecedented rapidity. They needed more room and better accommodations to meet the increase of their business. They, therefore, entered into a contract with the defendant corporation on the 12th of March, 1892, to build for them at Nos. 10 and 12 Magazine street a four-story building, which was to be finished and ready for the occupancy of plaintiffs' business on the first of October, 1892, and to rent the same to plaintiff, who were to pay them seven thousand two hundred dollars for the first year, and eight thousand dollars for the fifth and last year of the lease; the rent increasing two hundred dollars each year. The building was not completed at the time agreed upon, and the plaintiffs occupied it only in January. No. 12 Magazine was the property of the defendant corporation. Plaintiff vacated it for the purpose of its being torn down, preparatory to the building of the structure agreed upon between the parties. The plaintiffs still continued to

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occupy 52 Canal and 71 Common, and they also obtained from the defendant corporation, free of rent, the use and occupancy of part of No. 23 Magazine, using about three-fourths of the building.

In anticipation of occupying the building, and a large increase of sales, the plaintiffs ordered more goods than they had usually purchased when occupying their former places of business. For imported goods the orders were placed as early as March, and for domestic goods, in June and July, the delivery of the goods being so arranged as to arrive about the time plaintiffs did their largest and most profitable business, in the fall of the year.

Foreign and domestic orders, to certain extents, were countermanded when plaintiffs ascertained that they could not get possession of the new building on the 1st October.

By reason of the failure of the defendant corporation to deliver to the plaintiffs the new building, they brought this suit for damages against the defendant corporation for the sum of thirteen thousand nine hundred and seventy-nine dollars and eighty-eight cents, the items composing this amount being for gas bills, extra labor, meals, etc., extra night work by the plaintiffs, A. J. and W. H. Dwyer, and loss of profits.

The plaintiffs were met, at the inception of the suit, by an exception that the suit was one for a passive violation of a contract, and that as a condition precedent, and a prerequisite to the institution of such suit, there must have been a legal putting in default by a special demand for compliance, which the acceptors averred had not been done.

The exception was overruled. Reserving the same, defendants answered with a general denial, and specially averred that they were prevented by causes over which they had no control from completing the building by the specified time; that to prevent injury to plaintiffs by the unavoidable delay in delivering the new buildings to them, the defendants authorized the plaintiffs to renew the lease they had held on 52 Canal and 71 Common streets, for the months they occupied said buildings, and assumed the entire lease after January 1, 1895, and paid to plaintiffs the excess of the lease over that which they had been paying for said premises, and that they gave them 23 Magazine street free from rent, and in thus accommodating them they were provided with better facilities than they ever had for handling and displaying goods, and that, there-

fore, they suffered no injury by the delay in the delivery of the building. And they also specially deny any legal obligation to pay for anticipated profits from the 1st October, 1892, to 1st January, 1898.

There was judgment for the plaintiffs in the sum of five thousand five hundred and forty-three dollars and thirty cents, with legal interest from December 12, 1898.

The defendant corporation appealed.

Defendants' answer and the testimony in the record shows that they acknowledged their inability to complete the building by the 1st October, 1892. A putting in default under such circumstances would be a vain, an idle and a useless ceremony. Non-performance by the defendants of their contract justifies the suit against them. *Allen, West & Bush vs. Steers*, 39 An. 587.

There was no fortuitous or irresistible force which prevented the defendants from completing the building; they are, therefore, liable for damages for the inexecution of the contract. C. C. 1933. The testimony shows, however, that the defendants acted in good faith, and not for self-interest, and were guilty of no fraud. They are, therefore, liable only for such damages as were contemplated or may be reasonably supposed to have entered into the contemplation of the parties at the time of the contract. C. C. 1934, Sec. 1.

The general rule is that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived. *Id.*, Sec. 2.

The loss which the creditor has suffered, and the gain of which he has been deprived, must be the natural and proximate cause of the wrong. 2 *Greenleaf*, par. 256; *Sedgwick Damages*, 362. It has been otherwise expressed as the direct, necessary, or legal and natural consequence. It must not be remote or consequential, but the natural consequence. Every man is expected to foresee the usual and natural consequences of his acts, and for them he is to be held responsible and accountable, but not for consequences that could not be foreseen. *Pothier Obligations, Damages*; *Doriocourt vs. Lacroix*, 29 An. 287; *Massie vs. Baily*, 33 An. 485; *Vidalat vs. New Orleans*, 43 An. 1121; 17 Pic. 78; 8 Texas, 324; 13 Ala. N. S. 490; 28 Me. 361; 2 Wis. 427; 1 Sneed, 518; 4 Blackf. 277; *United States vs. Behan*, 110 U. S., 388.

The damage must be the proximate consequence. Vague and in-

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definite results, remote and consequential, and thus uncertain, are not embraced in the compensation given by damages. It can not be certainly known that they are attributable to the wrong, or whether they are not connected with other causes. *Id.*; 4 Jones N. C. 163.

In *Schleider vs. Dielman*, 44 An. 471, referring to Art. 1934, C. C., this court said: "In this connection, the question to be determined is, whether the unearned profits of a transaction properly enter into a calculation of the loss which the creditor has sustained, and the profit of which he has been deprived, in the sense of that article.

The decisions based on that article have invariably placed a strict interpretation on its provisions, the court generally awarding only such damages as will fully indemnify the creditor, and disallowing speculative profits, confining them to the immediate and direct consequences of the breach of contract.

In the case under consideration, the contract had no reference to any article of merchandise which was to be delivered on a certain day, nor had it any relation to the character or the amount of business, the number of employees, or the hours of labor to be performed by them. All these matters were not incidents of the contracts, and necessarily, for a breach of it, could not have been within the contemplation of the parties. It was not one of those contracts alluded to in the *United States vs. Behan*, 110 U. S. 338, where the damages would be the profits realized by performing the whole contract. The only damage the plaintiffs would be entitled to here is the amount they necessarily expended by reason of the failure of defendant to deliver the building to them on the 1st of October, 1892.

The claim for damage is generally based on the assertion that if the plaintiffs had occupied the building at the time agreed upon they would not have suffered any loss; that is, they would have had no gas bill to pay, no extra labor to employ, no extra meals to serve, and that they would have had in stock merchandise to fill orders, which they were compelled to decline for want of the necessary material on hand. All these items of damage are so uncertain, resting upon so many contingencies attending a large commercial business, that they can not be solely attributed to the violation of the contract, and may in part, at least, find their source in other causes. There is too much of an element of uncertainty about them. For instance, the plaintiffs used gas before they made the

Dwyer Bros. vs. Administrators.

contract, and the amount depended upon the rush of business and the necessity of night work, and the condition of the weather. That they used less gas in the new building they now occupy is certain. In the future, if plaintiffs' business meets with the phenomenal increase which has attended it, the gas bills may largely exceed those they paid in October to January 1, 1892, in their former place of business. We are not informed as to the amount of difference. And the same may be said of extra labor. They employed it before the contract was entered into. The necessities of their business demanded it, and also the service of extra meals to their employees. It is certain that the defendants are not responsible for the gratuity, the Christmas present of nine hundred dollars to plaintiffs' employees. Nor are they responsible for the individual labor of the employees in their business, although performed at night, and, as they say, would have been unnecessary in the new building. The motor placed in the elevator of the buildings formerly occupied by plaintiffs can form no item for damage, as it was, we think, a matter of personal convenience to themselves, and to facilitate access to upper floors.

The loss of profits is narrowed down to the gain which would have been made by plaintiffs in the sale of twenty-three thousand eight hundred and one dollars and fifteen cents of goods which they did not have in stock, the profit on which, had they been sold, would have been three thousand, one hundred and sixty-three dollars and sixty-five cents. These goods had been ordered, and countermanded when it became evident that the new building would not be ready on 1st October. It is admitted orders to the above amount were received, and not filled because the goods were not on hand. This was a matter for the business discretion of plaintiffs, resting in their discretion and judgment. Had they seen fit to do so, they could have continued the order and stored the goods at the expense of defendants. It is sufficient to say that they did not sell the goods, for the reason they did not have them in stock. All the items of damage above referred to were not, and could not have been, in the contemplation of the parties when the contract was entered into, and they are not the immediate and proximate consequence of the violation of the contract.

We find only one item to which the plaintiffs are entitled to damage. It was evident in the contemplation of the plaintiffs to have more room for the transaction of their business, and this the defend-

 Vincent vs. Phillips.

ants agreed to furnish. Goods were ordered in anticipation of the additional room the plaintiffs expected to have at their disposal. When they reached here they did not have the room to accommodate them and rented a warehouse in which to store them, for which they paid seventy-four dollars and fifty cents.

It is therefore ordered, adjudged and decreed that the judgment appealed from be avoided so as to reduce the judgment against defendants to seventy-four dollars and thirty cents, the appellees to pay costs of appeal.

 No. 11,648.

WILLIAM G. VINCENT VS. MRS. CAMILLA M. PHILLIPS.

The appellant's claim is for more than \$2000.

He, in addition, pleads for the nullity of the sale of valuable property of the succession. The probability that in the settlement of the succession the appellant's proportion of the assets will be less than the minimum jurisdictional amount of this court is not cause for dismissal of the appeal.

The value of the property, the sale of which the appellant seeks to annul, is the test of jurisdiction. *Katz & Barnett vs. Gill*, 43 An. 1041.

A tutrix administering a succession, without opposition, has authority to stand in judgment in a suit to dissolve a sale by the resolutive condition. *Bryan vs. Atchison*, 2 An. 462.

It devolves upon the creditors to protect their rights by intervening in the suit, and they have no cause of complaint of the tutrix, defendant, for not notifying them. *Tertrou vs. Comeau*, 28 An. 638.

Under the terms of the contract, by the failure to pay one of the instalments the other instalments not matured became due and exigible. The action was, therefore, not premature.

The exercise of the resolutive condition retroacts and places matters as if the sale had never existed. The plaintiff, vendor of the property, is entitled to the revenue made by the defendant debtor during the time the latter owned the plantation.

The creditor, on the other hand, must return the amounts of purchase price received, with interest.

The crop of 1894 was received by the plaintiff, creditor. Its value can not be charged to the debtor, it having been received in kind by the creditor. To that extent the judgment appealed from is amended.

Under the prayer for general relief the date from which interest begins to run may be considered as alleged.

The judgment of the District Court fixed the value of the improvements made by the vendee on the place, as shown by the testimony.

A PPEAL from the Fourteenth Judicial District Court for the Parish of Pointe Coupée. *Talbot, J.*

47	1238
48	353
49	1019
47	1238
52	244

Vincent vs. Phillips.

William W. Leake and Branch K. Miller for Plaintiff, Appellee.

Dinkelspiel & Hart and Yoist & Claiborne for Metropolitan Savings and Pledge Bank, Appellant.

Argued and submitted on briefs.

Opinion handed down, June 8, 1895.

Rehearing refused, June 29, 1895.

ON MOTION TO DISMISS THE APPEAL.

The opinion of the court was delivered by

BREAUX, J. This case was remanded in order to ascertain whether or not the succession was insolvent and the appellant had an appealable interest. *Ante* p. 1216.

It was proved that the succession is insolvent, and that the appellant is a creditor in an amount within the jurisdiction of this court.

Before this court the appellee, William G. Vincent, urges that the appeal should be dismissed for the reason that the appealable interest of the Metropolitan Bank, appellant, is below the minimum jurisdictional amount of this court.

Taking the inventory of the assets of the succession as a basis of total active, and deducting from that total the amount of the acknowledged debts of the succession (including appellant's), the appellee argues that the amount to be paid plaintiffs, in any contingency, will be considerably less than two thousand dollars, although his claim is for a larger amount.

The amount of appellant's claim being within this court's jurisdiction, we think that the inventory is not conclusive evidence of the value of the property, and that the debts may be considerably reduced in course of the settlement of the succession. The jurisdiction is determined by the amount of the claim and not by the amount not yet determined, for distribution. Moreover, the court has jurisdiction of appellant's demand to annul the sale, presenting issues entirely within the jurisdiction of this court.

The property was appraised for forty-five thousand dollars.

The nullity sued for, if decreed, will be in the interest of the creditors. *Katz & Barnett vs. Gill*, 43 An. 1041.

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ON THE MERITS.

The Metropolitan Bank, not originally a party to the suit below, has taken this appeal as a creditor of the late Marshall P. Phillips, averring that it is aggrieved by the judgment herein in favor of the plaintiff.

The appellant assigns for error—

First—That the widow, who had qualified as tutrix of her minor children, is without capacity to stand in judgment without notice to the creditors or opportunity to be heard.

Second—That the defendant did not defend the suit in the District Court.

Third—That the succession being insolvent, an administrator should have been appointed.

Fourth—That there was no evidence establishing that plaintiff had remained in possession of the notes executed by the vendee.

Fifth—That the action was premature, the extension of time not having expired.

Sixth—That plaintiff was not entitled to the revenue, nor to the rents.

Seventh—That he was not entitled to the revenues for the year 1894, nor to the crop of that year, which was on the premises at the time the judgment was rendered.

Eighth—That the plaintiff was not entitled to interest or rents or revenues, and the judgment was *ultra petitem*.

Ninth—That the succession is not given proper credit for improvements.

Tenth—That no tender was made.

The first ground assigned, that the widow as tutrix administering her husband's succession was without capacity to stand in judgment, is not sustained by the authorities.

In *Bryan vs. Atchison*, 2 An. 462, a well-considered case, the defence was that a tutrix can not stand in judgment in an action for the sale of property of the minors, and that a sale, under a judgment obtained in such a case, will not be binding on the heirs or creditors.

The defence in that case failed, and the court held that a tutor may, as such, administer the succession.

Regarding the alleged want of notice by the tutrix to the creditors of a pending suit, made part of defendant's first assignment of errors:

The plaintiff creditor and the defendant tutrix were not in duty bound to notify the creditors of the succession of a suit for the resolution of the sale. It devolved upon the latter to intervene and protect their claims. It has been decided that a judgment decreeing the sale of succession property to pay debts is valid, although not preceded by notice to the creditors. There is no rule of law under which an exception should be made and the legal representative of the succession (or the creditor suing) required to notify the creditors of a suit for a resolution of the sale.

The Metropolitan Bank, in general terms, complains that the defendant did not defend the suit, and that it was a consent decree.

There is a *contestatio litis* on the face of the papers. The estate was opened, an inventory was made, and the tutrix qualified some time prior to the suit. The action was brought, the original papers were served, and the usual delays intervened from the day of service to that of judgment.

The Metropolitan Bank had ample time, in its own defence, to urge the grounds it contends the defendants should have urged.

The assignment of errors also sets forth that the succession was insolvent, and that there was a consequent necessity for the appointment of the administrator.

The succession was insolvent.

But the creditors had it in their power to prevent the tutrix from administering as tutrix.

We do not wish to be understood as limiting the right which every creditor may have to insist upon the appointment of an administrator of an estate in cases where their interests require such an appointment. The creditor who does not object to the administration of the tutrix is not in a position to successfully complain of her acts of administration, on the ground that having applied for the administration she should have brought her administration as tutrix to a close. As she had not yet qualified, and as the creditor had not urged the least objection, it is too late on appeal to assail her acts on the ground that the mere application for administration was repugnant to her acts as tutrix administering the affairs of the succession.

It is also alleged in the assignment that the mortgage notes did not remain untransferred in plaintiff's possession.

Under the pleadings, we do not think it was incumbent on plaintiff to prove that he had not at any time transferred the notes, originally issued to him as payee.

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The cited case, *Bank vs. Cage et al.*, 40 An. 140, has no bearing upon the issues, for the reason that the transfer of the note was established, and the fact was manifest that it had been subsequently transferred back to the original holder.

The issue was presented and the evidence admitted.

The *onus* does not rest on the vendor, who sues for a resolution of the sale, of proving that he never, at any time, parted with his notes, in the absence of any plea on the subject on the part of the defendant.

The alleged prematurity of the suit is not supported by the facts. The debt was due to plaintiff when the suit was brought.

We think that the notes had matured on their face. Moreover, the plaintiff stipulated in the deed giving an extension, that if the debtor defaulted in making any payment, the whole debt would mature.

The Metropolitan Bank urges as one of its grounds, that the plaintiff was not entitled to the revenues made by the defendant during the time he owned the plantation.

The resolatory condition operates a revocation of the obligation. It even retroacts and places matters as if the sale had never existed; *in præteritum tempus ex tunc*. All things must be replaced in the same state as if the obligation had never existed. The creditor must return the property and the fruits.

"The effect of the resolatory condition is retroactive and puts the parties in the same position of having never contracted." O. C. 2045. The consequence of which is that the acquirer of property under that condition, will, on resolution, owe its fruits from the day of the contract, and the other party the principal and the interests of the sums received. *Mechanic's Society*, 81 An. 685; *Detepus vs. Shallus*, 15 La. 372.

The bank urges that in no event the plaintiff is entitled to the revenue for the year 1894. There is force in this objection. The plaintiff, under the judgment resolving the sale, became the owner in July, 1894. The evidence taken in that month showed the net revenue that would be made on the crop at the end of the year. At the end of the year it was the property of plaintiff. The defendant and the late debtor of the plaintiff did not receive any part of the proceeds. They can not be charged with that which they have not received. The sum of five thousand dollars, allowed in the judgment

for the crop of 1894, must, therefore, be deducted from plaintiff's total credit under the terms of the judgment.

The bank assigns, as another error, that the judgment allowing interest is *ultra petitem*, and that plaintiff is not entitled to interest on the revenue. With reference to the interest claimed in the supplemental petition, which we think was at issue, plaintiff claims legal interest without alleging a date.

Under the prayer for general relief the date may, in effect, be considered alleged. *Leverich vs. Walden*, 1 Rob. 469. Moreover, if the interest be due on the claim it is a legal consequence of the claim for the amount of the fruits. *D'Aquin vs. Coiron*, 8 N. S. 622.

The case upon this point may be *sui generis*. It does none the less seem fair and equitable that, as the plaintiff must pay interest on the sums for which he must account, the defendant should also pay interest on the sums for which she must account.

REGARDING THE INTERESTS ON THE FRUITS.

The plaintiff having been held to account for legal interest on the price collected, the District Court held the defendant bound for interest on the amounts received for crops.

It is an equivalent in principle, needful to place matters, between vendor and vendee, as if the sale had never existed.

"*When the interest is a legal consequence of the debt or obligation, without any stipulation, as demand for the principal is a demand of both principal and interest, the one necessarily follows the others.*" *Duke of Richmond vs. Milne's Executor*, 17 La. 381.

The assignment of error that the succession is not given proper credit for improvements is not sustained by the facts.

The amount proved by the evidence was allowed in the judgment. The District Judge who heard the witnesses thought the estimate placed on the value of the property correct. After reading and considering the testimony on that point, we conceive of no reason to amend the judgment in so far as relates to credit for improvements.

And, lastly, the appellant bank urges that no tender was made. Tender was not an issue in the court below. We do not think it proper to decide that the plaintiff did not offer to return the price and interest; an omission not established by evidence in the lower court. The cases cited are cases in which tender was required by an issue of some sort.

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A third person on appeal is without right to have a judgment annulled, for want of tender, on no issue of tender previously raised. Moreover a real tender is unnecessary when the offer to pay is refused.

Defendant's pleas in her answer were, at least, equivalent to a refusal to accept any tender. She not only did not plead want of tender, but tendered a defence entirely inconsistent with any willingness on her part to accept any amount if tendered.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended by deducting five thousand dollars from the amount heretofore allowed to the plaintiff, leaving him indebted to the succession of Marshall P. Phillips in the sum of five thousand and fifty-six dollars, instead of fifty-six dollars, as heretofore decreed by the District Court (also whatever interest may have been charged on the said five thousand dollars in the judgment appealed from). In all other respects the judgment is affirmed.

The plaintiff and appellee to pay to the Metropolitan Bank its costs in both courts.

No. 11,791.

THE STATE OF LOUISIANA EX REL. TOWN OF MANSFIELD VS. POLICE
JURY OF DE SOTO PARISH.

47 1244
51 1206
51 1206
51 1206
47 1244
108 457

It was not in contemplation of the framers of the Constitution in declaring in Art. 202 of that instrument, that the taxing power may be exercised by the General Assembly for State purposes, and by parishes and municipal corporations, under authority granted to them by the General Assembly for parish and municipal purposes, that the General Assembly should authorize or direct the parochial authorities to exercise their taxing power for municipal purposes; on the contrary, it was intended that the taxing power of the State, that of the parishes and that of the municipal corporations, should be kept separate and distinct.

An act of the General Assembly directing parish authorities to turn over to the towns situated within their borders a portion of the licenses levied, and imposed by them for parish purposes, is unconstitutional.

A PPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

Elam & Elam for the Relators, Appellants:

The title of Act No. 165 of 1894, in all respects covers the body of the act, and neither the title nor the body of the act embrace

more than one general object, viz.: that of "giving to incorporated cities and towns the right to demand and receive from the police juries of their respective parishes the licenses collected annually by the parishes from said cities and towns, less the criminal, public school and other expenses paid out on account of said cities and towns, the taxes paid on property in said cities and towns to be first exhausted in paying the enumerated expenses." *New Orleans Taxpayers Association et al. vs City of New Orleans*, 35 An. 570; 38 An. 782; 35 An. 1141; 38 An. 620.

Article 56 of the Constitution of 1879 does not contain any prohibition to the effect that the funds, credit or property of the State shall not be loaned, pledged or granted to any political corporation. In fact the article itself clearly intends to make the distinction between a political and a public corporation.

"The taxing power may be exercised by the General Assembly for State purposes, and by the parishes and municipal corporations under authority granted to them by the General Assembly for parish and municipal purposes." Art. 202, Const. 1879.

Act No. 165 of 1894 does not levy any tax, but is merely the appropriation of a tax already levied and collected.

"The control, administration and disposition of the funds of the State, and the appropriation thereof to the payment of debts, are powers appertaining exclusively to the legislative department." 42 An. 927.

If the court should hold that Act 165 levies any tax, then such a tax is levied for a public purpose, and as such is within the scope of legislative authority.

"Under the Constitution of some of the States the Legislature can not impose a tax for corporate purposes, having power only under proper enabling acts, to submit the matter to local officers, or to the people of the municipality, where the purpose is not one constituting a municipal obligation to the general government." *Am. and Eng. Ency.*, Vol. 25, p. 81; *Will County vs. People*, 110 Ill. 511; *Ibid*, 82; *Steve vs. Hennepin Co.*, 33 Minn. 355; *Ibid*, 82.

Primarily the Legislature determines what is a public use, "and when it has declared what may be so regarded, courts will not interfere, except in clear cases of abuse or usurpation of au-

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thority. What is for the public good, and what are public purposes are for the Legislature to say, and it has a large discretion in determining these questions which will not be controlled by the courts, unless under the exceptions above noted and such like." 38 An. 292; 26 An. 561; Cooley Const. Lim. 608, 609; State vs. Shakespeare (41 An.); Cooley Const. Lim. 195; 19 Wis. 624; 88 Amer. Dec. 711; 50 Pa. St. 150; 21 O. St. 14; 8 Am. Rep. 24; 41 Cal. 173; 22 Mo. 384; 28 Ark. 317; 5 Abb. (N. Y.) Cas. 489; 13 N. Y. 149; 85 Pa. St. 170; 27 Am. Dec. 733; 55 Pa. St. 456; 52 Pa. St. 432; 3 Paige (N. Y.), 73; 22 Am. Dec. 679, Am. and Eng. Ency., Vol. 25, p. 90; 32 Conn. 128; 21 Pa. St. 174; 59 Am. Dec. 759; 25 Pa. St. 128; 65 Pa. St. 146; 8 Am. Rep. 615; 9 B. Mon. (Ky.) 344; 20 Wall. (U. S.) 655; 33 Mich. 164; 50 Vt. 178; 46 N. H. 415; 38 An. 292; 57 Tex. 635; 45 Tex. 299; 63 Barb. (N. Y.) 437; 18 N. J. Eq. 519; 90 Am. Dec. 634; 64 N. Y. 91; 21 Am. Rep. 586; 62 Ill. 628; 14 Am. Rep. 99; 8 Bush. (Ky.) 508; 8 Am. Dec. 480; 24 Wend. (N. Y.) 65.

Farrar, Jonas & Kruttschnitt, John C. Ryan, John Dymond, Jr., Robert Montgomery, C. F. Garland, T. C. Armstrong, S. T. Bird and W. H. McLendon as amici curiæ, on same side:

It is an elementary principle of law that a governmental body should not exercise the power of taxation to an extent notoriously in excess of its needs.

Each governmental subdivision should bear its proportion of the general governmental expense.

Act 165 of 1894 does not conflict with Art. 29 of the Constitution. It embraces but one object, to-wit: That the parishes shall not collect from the municipalities, in future, funds in excess of the parish governmental expenses contracted on account of the municipalities, and to this end to require the parishes to return to the incorporated towns any surplus of licenses collected by the parishes from within the towns, after the governmental expenses of the parish, contracted on account of the town, have been first paid out of the revenues collected by the parishes from within the towns. 32 An. 779; 34 An. 556; 39 An. 455; 46 An. 1031; Cooley's Constitutional Limitations, 143.

Courts will look to the journals of a convention to ascertain the sense in which which a word was used by the convention in constitutional provision. 5 Sneed, 482; 43 An. 959; Sutherland's Statutory Construction, Sec. 300.

Where the word municipal appears in an ordinance then under consideration by a constitutional convention and the word is subsequently omitted from that part of the constitutional article as finally adopted, the courts will hold that it was the intention of the convention to exclude it from the legislation about to be enforced. 43 An. 961.

Public, as the word appears in Art. 56 of the Constitution, means of a public character. The context of the article shows that the convention considered the municipalites and parishes political corporations.

Act 165 of 1894 does not conflict with Art. 56 in the inhibition under consideration as to the granting of public funds, because that provision does not affect, as grantees, such political corporations as municipalities. Fisher vs. Auditor, 39 An. 452.

Courts will not hold laws unconstitutional and declare the acts of the Legislature void where any doubts exist. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of the incompatibility with each other. Nor will a constitutional prohibition be extended or enlarged by construction. 39 An. 452; 6 Cranch, 128; 45 An. 935.

Great respect is entertained by the courts for legislative conclusions. Cooley's Constitutional Limitations, 4 Ed., 199.

The funds which the municipalities are to receive under the provisions of Act 165 of 1894 are virtually the town's own funds, being collected from within its limits, in excess of the parish needs, and, being the town's own funds, are not affected by Art. 56. Planting Company vs. Tax Collector, 39 An. 459; 45 An. 1235.

The revenues of parishes and municipalities, whether taxes or licenses, are subject to legislative control. Tiedeman's Municipal Corporations, Chap. 2, Sec. 12.

In all matters, not prohibited by the Constitution, the General Assembly is supreme. 46 An. 844.

Act 165 of 1894 does not conflict with Art. 202 of the Constitution,

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because it does not require parishes to levy taxes for anything but parish purposes. It requires that the parishes shall not levy licenses which, with the taxes, shall be in excess of the needs of the parishes arising from or on account of the towns. The parish keeps whatever excess of taxes there may be.

Nor does the act conflict with Art. 204 of the Constitution, for the funds, whether they may be used and expended by the parishes or municipalities, are used and expended for governmental purposes. Both of these political subdivisions are component parts of the State, exercising powers delegated to them by the State. It is respectfully submitted that the controlling idea pervading Act 165 of 1894 should prevail when the test of Art. 202 of our Constitution is applied to it, and, for the reasons we have given, the act should be declared constitutional.

Where there are no vested rights or bonded indebtedness involved, parish revenues arising out of the exercise of the taxing power under the granted authority of the General Assembly are subject to legislative control. This control of the alimony is specially recognized in Art. 202 of the Constitution, and is in accord with our American system of government. 42 An. 98; Tiedeman's Municipal Corporations, Chap. 1, Sec. 12; Dillon's Municipal Corporations, Chap. 1, Sec. 38, *et seq.*

J. F. Pierson and Lee & Liverman for Appellees:

Public corporations have the right to plead the invalidity and unconstitutionality of legislative enactment divesting their alimony, and to have their contention determined by the courts. 42 An. 92.

Legislative control over a parish is not so absolute that it may not be controlled and restrained by organic law. Legislative limitations imposed by constitutional provision can not be overleaped. *Ibid.*

Parishes, cities are civil divisions coeval with the State, permanent elements of its frame of government, durable and indestructible, except by organic provision, and though in a great degree subject to legislative control, the State is but the aggregate of these bodies. 15 N. Y. 561.

The city of New Orleans is a municipal corporation with inherent

powers of existence for purposes of its creation, and can not be blotted out of life nor rights of its citizens diverted. 42 An. 100. Parishes or civil divisions of the State are the American system of complete decentralization in the vital idea that local affairs shall be managed by local authority, and general affairs only by central power. Cooley's Const. Lim., 4 Ed. (1878), 228, 229.

They possess two classes of powers and rights—public and private. In the one it is the State's agent and subject to its control; in the other, it is the agent for the local inhabitants with the character of individuals, and not subject to absolute legislative control in its right to acquire and dispose of its property, sue and be sued, like private corporations or persons not *sui juris*, as minors and married women. It may own property which is not under legislative control while the parish exists. N. O., M. & C. R. R. vs. City of New Orleans, 26 An. 478.

As to their civil, political or governmental powers in their character as governmental agencies, legislative control of parishes is supreme, except as limited by constitutional provision, but in their proprietary or private character they are a distinct legal personality in their property and contract rights and regard *quo ad hoc* a private corporation. Dillon Mun. Corp., Sec. 39, p. 151, Ed. 1873. Admitting complete legislative control over parishes (except as limited by constitution), yet some limits exist as to this; some are expressly defined, others spring from usage, customs and maxims of our people, which are part of the State's history, in view of the perpetuity of which all constitutions are framed, and of which people's right thereto can not be deprived except by express renunciation. Cooley Const. Lim. 281, Ed. 1878.

Local community has the right to fix their local burdens as to which legislative control must be limited to control only their civil, political and governmental powers. Cooley Const. Lim., 282.

The four rules drawn from all the conflicting adjudications in different States on this subject, stated *Ibid*, 283, *et seq.* See Dartmouth College vs. Woodward, 4 Wheat. 694; 26 An. 478.

Under third rule no legislative power exists to compel contracts for local purposes, or to assume obligations, outside their governmental functions. These must be left to local discretion to determine in local interest. Legislature may authorize but can

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not compel action as to such local matters. Cooley Const. Lim., 284, 285, Note 1, p. 285.

Act No. 165 of 1894 is invalid and unconstitutional on the grounds, and for reasons:

It infringes Art. 29, Const. 1879, in that it embraces more than one object, and embraces objects not stated in its title. 38 An. 626; 33 An. 63; 21 An. 480; 5 An. 93; 25 An. 598; 13 An. 434.

It infringes the taxing powers of the parishes conferred by Art. 202, "for parish purposes," by diverting such taxes to other persons and uses, in derogation of the parish's power to tax "for parish purposes."

It infringes organic prerogatives of the parishes by conversion of their alimony, and bestows it upon cities and towns not in aid of any declared public purpose or use. It imposes obligations upon parishes without consideration in relation to matters not within legislative control, but which belong exclusively to the local powers and authorities. *Cole vs. LaGrange*, 113 U. S. 6.

Legislative enactment can not assume judicial function nor exercise judicial powers by determining the rights of parties. *State ex rel. McCurdy vs. Tappan*, 29 Wis. 864, and authorities there discussed. 9 Am. Rep. 622.

"It certainly must be admitted that by the principles of every free government, and by our Constitution in particular, it is not in the power of the Legislature to create a debt from one person to another, or from one corporation to another, without the consent, express or implied, of the party to be charged." *County of Hampshire vs. County of Franklin*, 16 Mass. 76; *Atkins vs. Town of Randolph*, 31 Vt. 226; *Taylor vs. Porter*, 4 Hill, 143; *State vs. Tappan*, 9 Am. Rep. 622 (29 Wis. 864).

It contravenes the prohibitions in Art. 56 of the Constitution, in that the act aims to "grant" the "funds" of a political corporation—the parish—to a "public corporation"—the city or town—in violation of the constitutional prohibition. It is in violation also of the prohibition: "nor shall the State undertake to carry on the business of any such corporation," in Art. 56.

In parishes with cities and towns reaping the benefit flowing from the act, the uniformity and ratable equality of the taxing powers of the parish over its citizens are destroyed by lessening the burdens of parish taxation on such urban citizens whilst increasing those burdens on all other citizens.

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Argued and submitted, May 9, 1895.

Opinion handed down, June 3, 1895.

Rehearing refused, June 29, 1895.

By Act No. 165 of 1894 of the General Assembly of Louisiana it is made the duty of the police jury, on the demand of the mayor, or any other person authorized by the council of any incorporated city or town in this State, made to the police juries of their respective parishes, at its first meeting of each year, to advise its collector and treasurer of such demand, and instruct them that all the taxes, licenses and other moneys collected by the parish on all properties, businesses, trades, professions and occupations, situated or carried on within said city or town, shall be kept separate from all other funds, and not paid out except as provided in said act.

Section 4 of said act provides that the clerk of the District Court and the sheriff of the parish shall keep a record of the criminal expenses occurring through their respective offices, on account of said city or town so applying to the police jury as aforesaid.

That according to the provisions of said act the magistrates and constables in the city or town so applying to the police jury of their parish are required to keep a separate account of the criminal expenses occurring through their respective offices on account of said city or town, and that the clerk of the police jury is also required to keep a separate account of the amounts paid out by the police jury, and also a *pro rata* of expenses of the city or town for building, maintaining and repairing the jail and court house belonging to the parish, which *pro rata* is to be fixed by the police jury.

That in obedience to said act, and with the intention of availing themselves of its provisions in their favor, the relators demanded, through C. C. Egan, a member of the town council of Mansfield, of the police jury of De Soto, at their first meeting on January 7, 1895, that the several officers specified in said act should be required to keep a separate account of the licenses, taxes and other moneys collected by the parish, on all properties, business, trades, occupations and professions, situated or carried on in the town of Mansfield during the year 1895, and also to keep a record of the several expenses of said town, as provided in said act, but that the said police jury refused to comply with this demand. That by the provision

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of said act, after paying the criminal and other expenses enumerated therein, which are occasioned by the town of Mansfield, out of the taxes collected on said town, and paying the balance, if any, out of the licenses on said town, that they are entitled to the remainder of said licenses. That the amount which the town of Mansfield would receive from the licenses thus given them by said act would be twelve hundred dollars.

They ask for a *mandamus*, directing and commanding said police jury to comply with the provisions of said Act No. 165, and directing them to require the collector and treasurer and other officers therein named, to keep a separate record of the taxes, licenses and other moneys collected in said town, and a record of the expenses of said town as is therein specified.

The police jury, for answer, averred that Act No. 165 of 1894 could not be enforced for the reason (1) that the title to the act embraces more than one object; (2) because said act is in direct conflict with the Constitution of the State, as set forth in Arts. 56, 202 and 204 of said Constitution.

The District Court was of the opinion that the act in question was not violative of either Arts. 29 or 56 of the Constitution, but that it was contrary to the provisions of Art. 202. So holding, the prayer for the *mandamus* was refused, and judgment was rendered, setting aside the alternative writ, and discharging the defendants.

Relators appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. The act, the enforcement of which is asked in this proceeding, is entitled: "An act giving the right to incorporated cities or towns of the State, to demand from the police juries of their respective parishes, the licenses collected annually by the parishes from the cities and towns on all business, trades, professions and occupations carried on within said cities and towns, less the criminal expenses and the school expenses, and all other expenses paid out by the parishes, on account of said cities or towns, and providing that the taxes collected by the parishes on the properties situated in the cities and towns be first exhausted in paying these expenses, and providing how these expenses are to be ascertained."

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By the first section, it is enacted that the incorporated cities and towns of the State, through their mayor or any other person authorized by their council, shall have the right to demand and have paid over to them, by the police juries of their respective parishes, all the licenses collected annually by the parishes on all businesses, trades, professions and occupations carried on within said cities or towns, less the criminal and public school expenses, and all other expenses paid out by the parishes on account of the cities and towns.

The second section provides that each city or town taking advantage of the act shall be required to defray all expenses occurring from and growing out of the prosecution of crimes, offences and misdemeanors committed within its corporate limits, also all expenses for running, conducting and maintaining the public schools in its corporate limits, and all other expenses paid out by the parish on account of the cities or towns.

The third section provides that the city or town wishing to take advantage of the act, shall apply through its mayor, or any person authorized by its council for that purpose, to the police jury of the parish, at its first meeting of each year, and the police jury shall grant the demand, and shall, at that meeting, advise its collector and treasurer of the demand; instruct them that all taxes, licenses and other moneys collected by the parish on all properties, businesses, trades, professions, occupations, situated or carried on within said cities or towns, shall be kept separate from all other funds, and not paid out, except as provided in the act.

The fourth section provides: "That the clerk of the District Court of the parish shall keep a record of the expenses occurring through his office to the parish on account of the city or town, and the sheriff of the parish shall keep a record of such expenses occurring through his office. The president of the school board shall keep a record of the expenses for running, conducting and maintaining the public schools of the city or town.

The fifth section makes it the duty of the collector of the parish to present to the police jury, at its second meeting of the succeeding year, a statement, certified to by the treasurer, of the amount of taxes, licenses and other moneys collected by him on all properties, business, trades, professions and occupations, situated or carried on within the limits of the city or town for the preceeding year, and the police jury shall order a warrant drawn on the treasurer of the par-

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ish in favor of the mayor of the city or town for the amount of the licenses collected by the parish as aforesaid, less the collector's and treasurer's percentage on same, which shall be the same as that of the State and parish, and less the amounts of criminal and public school expenses, and all other expenses paid out by the parish on account of said city or town for that year. It directs that the criminal expenses shall be based upon the statement of the clerk of the court, and of the sheriff, made in writing under oath, and that the public school expenses be based upon a statement made in writing under oath by the president of the school board of the parish. The section contains a proviso that all expenses of whatever nature paid out by the parish on account of the city or town taking advantage of this act shall be paid out of the taxes collected on properties situated in said city or town, and if these amounts be not sufficient, then the license fund collected from city or town, or a sufficient amount thereof, is to be taken to make up the deficiency, and the balance of the licenses is to be paid over to the city or town, provided that any surplus remaining from the taxes, and other moneys other than licenses collected by the parish from the cities or towns shall be used by the parish as they deem proper.

The sixth section provides, that under the head of criminal expenses, under the act, shall be included the fees and charges of the magistrates and constables and other expenses growing out of and attending the prosecution before magistrates of crimes, offenses and misdemeanors, committed within the corporate limits of said city or town, and makes it the duty of the magistrates and constables to keep a separate account of the amounts paid out by the police jury for such services, and on account of all other expenses not before provided for, which should be paid out by the parish on account of the city or town. It also provides that under the head of criminal expenses, shall be included a *pro rata* of expenses of the cities and towns for building, maintaining and repairing the jails and court-houses belonging to the parish, the *pro rata* to be fixed by the police juries.

The seventh section declares that if the amounts collected by the parish from the city or town are not sufficient to pay the criminal, public school expenses, and other expenses of the city or town paid out by the parish, the parish would have the right to refuse to grant the city or town the privilege granted under the act for another

year, and to continue to so refuse, until it had been shown by the city or town, to the satisfaction of the police jury, that the taxes, licenses and other moneys collected by the parish from the city or town on account of accumulation of property and moneys, or otherwise, are sufficient, provided that no parish shall have the right to refuse any city or town applying under the act, until, by an actual test under it of one year, it is shown that the expenses of the city or town to the parish are more than the taxes, licenses and other moneys collected by the parish from the city or town.

It will be seen from an examination of this act that the Legislature has attempted to provide for the opening of a credit and debit account between the towns and the parishes in the parishes in which there are incorporated towns. The towns are to be credited with all moneys arising from taxation upon properties within their limits, and also with the amount of all licenses imposed by the parish which are found to come from persons doing business within the different corporations, and they are to be debited with all amounts paid out by the parish on account of matters from which the towns are supposed to have been directly benefited, or for which they are supposed to be specially responsible.

The moneys standing to the credit of the towns are ordered to be separated from the balance of the moneys in the parish treasury, and the debits with which the towns are to be charged are directed to be ascertained by a complicated system of accounts to be kept by different State and parish officers, and reported to the police jury.

It will be observed that the statute does not contemplate that any portion of the taxes derived from the town properties should ever be turned over to the towns. They are to be applied primarily to the payment of the claims which the Legislature seems to have selected as those for which towns are peculiarly and equitably chargeable, and they are to be freed and to be made applicable for any purpose to which the police jury might see fit to turn them when it is found that there is a surplus over and above the payment of such claims. The moneys, however, drawn from licenses from persons living within the towns are, under no circumstances, to be applied to general parish purposes, but they are to be held as a sort of reserve fund to make good any deficit which might be found to exist by reason of the taxes from the town being insufficient to meet the legal demand upon it from the separate tax fund. If no such

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deficit is found to exist, then the whole amount drawn from licenses paid by the townspeople is to be paid over to the town without designation as to the purposes for which it is to be subsequently used.

This case has been ably presented on both sides, but the arguments have taken a much wider range than the determination of the issue involved requires. We have to be controlled by the special provisions of our own Constitution, and reasoning drawn from the general relations which the State, the parishes and the cities bear to each other in other jurisdictions furnish us little assistance.

Article 202 of the Constitution declares that the taxing power may be exercised by the General Assembly for State purposes, and by parishes and municipal corporations, under authority granted to them by the General Assembly, for parish and municipal purposes.

Article 206 declares that the General Assembly may levy a license tax, and in such case shall graduate the amount of such tax to be collected from the persons pursuing the several trades, professions, vocations and callings. * * * No political corporation shall impose a greater license tax than is imposed by the General Assembly for State purposes.

The District Judge, in rendering his opinion, said: "The only question under this article (202) would seem to be whether the grant of power to the parishes and municipal corporations, for parish and municipal purposes means that they can exercise this power for each other and each for itself. Can the parishes exercise the taxing power for municipal purposes and municipal corporations exercise it for parish purposes? Such, I think, was not the intention of the framers of the organic law. It is such an extraordinary proposition that each could be authorized by the General Assembly to exercise the taxing power for the benefit of the other, that such a conclusion could only be reached when supported by a plain and unambiguous provision of the Constitution. It seems to the court that the contrary is the plain meaning of the article above quoted, and that the Legislature is without warrant or right, under the Constitution, to require or authorize the police jury to exercise the taxing power for the use of municipal corporations of the parish as is evidently the purpose and effect of this Act, No. 165, under discussion. The taxing power is a most important one, and should be guardedly kept within the Constitutional limitations, and perhaps one of the best protections, both

to the public service on the one hand, and to the taxpayer on the other, is the rule firmly imbedded in our constitutions for many years, that the same power should impose the tax and control its expenditure."

We agree in opinion with the District Judge that the framers of the Constitution intended to keep separate and distinct the taxing power of the State, that of the parishes and that of the municipal corporations; that they never intended, in declaring that this power should be exercised by the parishes and municipal corporations "under authority granted to them by the General Assembly," that this authority should extend to empowering either of them to do so for purposes other than those in which each was directly concerned. It is easy to see that through this act the taxing power of the towns could be supplemented by that of the parishes for town purposes.

But we fail to see the authority under and by which the General Assembly can, after the parishes, in the exercise within constitutional limits of their taxing power, have acted for parish purposes, step in and apply the moneys arising from this legal exercise of their rights to purposes other than those which, in the opinion of the parish authorities, made the levy of the taxes and the imposition of the licenses necessary—taxes and licenses which they never would have levied or imposed—if they were to be forcedly taken away from them under orders of the General Assembly. When the police jury exercises its authority to impose licenses through the parish, it necessarily does so by ordinances general in their character, necessarily taking in people within as well as without the towns—its purpose is to utilize the moneys for general PARISH purposes—and it is difficult to see by what authority it can be prevented from doing so by an arbitrary order from the Legislature that a particular portion of the fund should be devoted exclusively to the interests of one particular portion of the parish, and then only in a certain contingency, which not happening, the moneys are not to be held in the parish treasury for other parish purposes, nor to be returned to the parties who paid the licenses, but to be turned over to the towns, who in the meantime may have exercised their power of taxing and licensing their own inhabitants up to the full constitutional limit.

Counsel for the parish say very pertinently: "The Legislature, under the Art. 202, is restricted to the power to authorize only. The article confers the taxing power on the parishes 'for parish pur-

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poses' just as effectually as it does the power in the Legislature for 'State purposes,' except only that the parish must exercise it under authority from the General Assembly. The Legislature is given no power itself to levy taxes for parish purposes, for that power is lodged by the article in the parish.

"It results that the parish must possess, in the power to tax, the same discretionary power over the subject as to the amount of the tax it will levy within the constitutional limit, and as to what are parish purposes, as that exercised by the Legislature in its power to tax for State purposes. Where the Legislature authorizes the parishes to exercise the taxing power to the full limit of the constitutional power conferred, then, necessarily, the exercise of that power in the parishes must reside in the parochial authorities exercising the parish power, to be exercised by them to meet the parish necessities of maintenance and sustenance. And these parochial authorities are only restricted in the exercise of the taxing power by constitutional limitations and legislative authorization, and within those limits it is solely a matter of parochial discretion to judge of the amount of the parish expenses and obligations they are required to meet by the exercise of the taxing power, and also to judge of what are parish purposes which they are required to meet under their taxing powers. These prerogatives of discretion in the authority to which the State has delegated the use of her taxing powers are inherent and necessary to the exercise of the power delegated.

"The immediate effect of the act is to take off the alimony provided for the support and subsistence of parochial institutions, to confer it upon towns and cities which are alike provided for, under Art. 202 of the Constitution; are endowed with the same powers of taxation for their purposes which are given to the parishes for parochial purposes. Alimony is apportioned to each class to be derived from the power, uniformly, equally and ratably to tax the citizens and property within the respective borders of each, under a system of fundamental principles inherent to American constitutional law, that local affairs shall be governed by the local authorities, and that the burdens of government shall be borne uniformly, equally and ratably throughout the territorial limits of the governing powers. We have been unable to reconcile the aims, objects or effects of Act No. 165 with the great underlying principles of our form of government or with the restriction or prohibition of the present Constitution."

We are of the opinion that the judgment appealed from is correct, and it is hereby affirmed.

No. 11,706.

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ROBERT LUCKETT, UNDER TUTOR, VS. THE CANADIAN AND AMERICAN MORTGAGE AND TRUST COMPANY, LIMITED.

An act importing a renunciation by a married woman of her paraphernal rights on the real property of her husband can not operate in favor of a mortgage creditor of her husband, unless same is evidenced by an authentic act, made in full compliance with the requirements of R. C. C. 123.

A judgment rendered in a suit between a mortgage creditor of the husband and his wife, based upon a compromise of her rights and an abandonment of her title, can not support the plea either of *res adjudicata* or estoppel, in a subsequent litigation with reference to the same subject matter between the same parties, their heirs or assigns.

A PPEAL from the Tenth Judicial District Court for the Parish of Rapides. *Andrews, J.*

Robert P. Hunter for Plaintiff, Appellee:

Cites 34 An. 632; 30 An. 1157; 33 An. 1010; 45 An. 377; 40 An. 695; 36 An. 824, and quotes authorities to sustain the following propositions:

A married woman can not, by any act of hers during the marriage, ratify a contract which is originally null.

She is not bound by her confession of judgment.

She can not be held for constructive fraud, but it must be actual fraud or deceit, otherwise it would be nothing more than an estoppel, which does not apply. *Bisland vs. Provosty*, 14 An. 173; *McIntosh vs. Smith*, 2 An. 556.

Married women are of limited capacity to contract and are forbidden to contract in certain cases. They are classed with minors. R. C. C. 1782, 1790.

Whoever deals with a married woman is put on his guard and contracts at his own risk, and it is incumbent upon him to ascertain that her proper estate can be charged with the debt.

A compromise with a married woman, induced by threats of a criminal prosecution against the husband is void. It is only when the husband is actually incarcerated that a married woman may bind herself to secure his release. *Gibson vs. Hitchcock*, 37 An. 218.

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J. C. Pugh and E. G. Hunter for Defendant, Appellant:

The doctrine of estoppel and *res judicata* applicable to married women. 26 An. 289; 34 An. 1171; 37 An. 324, 684; 44 An. 584.

The cases suggesting that a married woman is not estopped by her judicial admissions and confessions are based entirely upon the supposition that such confessions and admissions may have been induced by marital influence and coercion. 26 An. 289; 2 An. 343; 2 An. 440; 6 An. 121; 39 An. 705.

Mere advice and request by the husband do not constitute the marital influence which impairs a married woman's obligation. 15 An. 615; 37 An. 679; 44 An. 1103; C. C. 1749, 1559.

Argued and submitted May 9, 1895.

Opinion handed down June 3, 1895.

Opinion refusing rehearing June 21, 1895.

The opinion of the court was delivered by

WATKINS, J. This appeal presents the question of title *vel non* of the minor children and heirs of Mrs. Cornelia Luckett, *née* Petrovic, deceased wife of Henry P. Luckett, the question being collaterally raised by way of third opposition coupled with an injunction against the executory proceedings of the defendant, in the attempted foreclosure of a special mortgage, which was consented, during her lifetime, by her husband.

In the court below there was judgment in favor of the plaintiff, sustaining and perpetuating the injunction of the under-tutor, and the mortgage company has appealed.

The following is a brief summary of the salient facts about which there seems to be no question or dispute, viz.:

Mrs. Cornelia Luckett was owner by inheritance from her father, Charles A. Petrovic, and her mother, his wife, both deceased, of about eight hundred acres of land, situated in Grant parish, which she sold in 1881 to Lorenzo Smith for forty-six hundred dollars, and of that sum of money and its avails, her husband took possession and converted same to his own use.

On the 14th of February 1884, Henry P. Luckett presented himself

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before the clerk of the court and made oath to the fact that he had so received, used and converted the separate funds of his wife, and recognized her legal mortgage upon his real property as securing the restitution thereof—said affidavit being recorded at the time.

On the 8th of January, 1885, said Lockett appeared before a notary public and made, in due form of law, a *dation en paiement* of a portion of the property known as the Ashbourn plantation, situated in the parish of Rapides, consisting of about eighteen hundred acres, about five hundred of which are involved in this suit, the aforesaid act being duly recorded in the book of conveyance records for the parish in which it was situated, on the 15th of January, 1885.

On the 22d of October, 1888, Henry P. Lockett executed a special mortgage upon the aforesaid plantation, in favor of the defendant company, to secure the loan of the sum of twenty-two hundred dollars.

On the 20th of October, 1888, just prior to the acceptance by the defendant of the mortgage, Mrs. Lockett executed the following relinquishment under private signature, to-wit:

“Mrs. Nina Lockett, wife of H. P. Lockett, of Rapides parish, Louisiana, does hereby acknowledge full payment of a certain mortgage given by H. P. Lockett to her, the said Mrs. Nina Lockett; and the Clerk of the District Court of the parish of Rapides, Louisiana, is hereby requested to enter full satisfaction of said mortgage upon the records of his office. Said mortgage is dated 12th day of February, 1884, and was given to secure an indebtedness of five thousand dollars and interest, and is recorded in mortgage book ‘L,’ p. 45 *et seq.*, of the records of Rapides parish, State of Louisiana. This release is made because the Canadian and American Mortgage and Trust Company, Limited, is about to make a loan to H. P. Lockett, and is unwilling to make it unless the fact of the payment of this mortgage be entered of record so as to show the lien of said company will be absolutely the first lien.” This refers to the same consideration as that stated in the affidavit of Henry P. Lockett, which was recorded on the 16th day of February, 1884, in Mortgage Book “L,” p. 45.

This document was made part of the representation of Henry P. Lockett, upon which the company acted in granting the loan, which was to be secured by his mortgage when accepted; but it contains no mention of the subsequent *dation en paiement*.

Occasioned by his default, the mortgagee began foreclosure pro-

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ceedings *via executiva* in 1891, and caused the mortgaged premises to be seized. This seizure was opposed and enjoined by Mrs. Cornelia Lockett, claiming ownership under the *dation*.

In answer the mortgage company put her claim at issue by a specific denial of the validity of her title, and a special averment that the *dation* was "absolutely null, *because the consideration therein named was never received by the husband.*"

(The italics are ours.)

On the trial of that case there was judgment in favor of the company. Immediately thereafter time was granted to Lockett, and the executory proceedings were abandoned. Thereafter Mrs. Cornelia Lockett died—in March, 1893—leaving her minor children as her heirs at law.

In March, 1894, another order of seizure was obtained, and the injunction now under consideration was procured and sale of the property was arrested.

We append the following *résumé* of the plaintiff's present claims and pretensions, as it is well stated in the brief of defendant's counsel:

"In the present case the plaintiffs, after reciting the *dation en paiement* to their mother, and the cancellation of the legal mortgage of date of October 20, 1888, substantially allege that on or about August, 1891, the said Canadian and American Mortgage and Trust Company, Limited, instituted proceedings to foreclose their mortgage against Henry P. Lockett, and had seized and advertised for sale her land, to pay, in part, said mortgage, when she obtained a writ of injunction restraining said sale of land as above described and asserting the ownership of same and the nullity of said mortgage; whereupon the local agent of said Canadian and American Mortgage and Trust Company, Limited, and her said husband, by persuasion and the use of marital influence, and the said local agent, by threats against her said husband, induced her to withdraw and abandon her said suit, to dismiss her writ of injunction and to sign a document called a compromise, which was filed therein, containing acknowledgments as to the ownership of said property by her said husband, and other untrue acknowledgments and averments, which she signed in error and in ignorance of the fact that she could not bind herself and her property for her husband's debts in that form and without any consideration whatever received or promised

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her, and all of which acts and proceedings petitioners now allege and charge were concocted and gotten up by the then local agent and attorney of the said Canadian and American Mortgage and Trust Company, Limited, to have the said Mrs. Cornelia Lockett bind herself for her husband's debts, under the disguise of a compromise of a pending lawsuit, the said agent and attorney of the said Mortgage and Trust Company, Limited, and his said principal being then well aware of the justness of her ownership of the aforesaid property, and all of her rights in the premises, as above recited, and of the falsity of the averments and acknowledgments in said written act of compromise, which was prepared by him and is in his handwriting, and which he induced her to sign by threats of legal proceedings against her said husband for including her property in that mortgaged to the said Canadian and American Mortgage and Trust Company, Limited, and which said document she signed under duress and in error of fact and law, and without any consideration whatever, and under the marital influence and coercion of her said husband."

They urge the nullity of the judgment rendered in suit No. 3846 and the cancellation of the legal mortgage in favor of Mrs. Lockett. They pray for judgment in conformity with averments of the petitions.

With respect to the defendant's pleas and answer to this suit counsel's further statement is as follows, viz.:

"By exception and answer the defendant plead the former judgment *res adjudicata*, and averred the absolute nullity of the *dation en paiement* as being without consideration, and specially denied that any influence was used by the attorneys representing the defendant upon the said Mrs. Cornelia Lockett, to induce her to sign the *retraxit* or statement, acknowledging the property to belong to her husband, and consenting that judgment should be rendered against her, and averring that it was done voluntarily by her on the advice of her attorneys, against whom these minors do not charge fraud nor want of authority."

It was upon these issues that the case went to trial, and judgment was pronounced in favor of the plaintiffs in the court below.

The decision of this case is, by both petition and answer, made to turn upon the effect that is to be attributed to the former suit and judgment, and to the wife's renunciation, which antedates the loan and mortgage.

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The pith and germ of the plaintiff's averment are that the husband of their deceased mother, "by persuasion and the use of marital influence, and the local agent of the defendant, by threats against the said husband, induced her to withdraw and abandon her said suit, to dismiss her writ of injunction, and sign a document called a compromise, which was filed therein, containing acknowledgments of the ownership of said property by her said husband and other written acknowledgments and averments which she signed in error, and in ignorance of the fact that she could not bind herself or her property for her husband's debts in that form, and without any consideration whatever received by or promised to her."

Contra, the defendant's answers and pleas are (1) *res adjudicata*; (2) the *dation* of plaintiff's mother was without consideration; (3) the absence of any undue influence exercised by the company's agent in procuring Mrs. Lockett's renunciation; (4) that plaintiff's mother, acting under the advice of her own counsel, gave her consent to the compromise of the suit voluntarily and willingly.

It is clear and undenied that Mrs. Lockett, the mother of the plaintiff, was primarily owner of a plantation in Grant parish, the proceeds of which, when sold, passed into the possession and use of her daughter's husband, Henry P. Lockett. That, recognizing that fact, the latter made an acknowledgment of his indebtedness to his wife and caused the same to be duly recorded, as the law requires, so as to have effect as a legal mortgage, good as to strangers.

That the oath of Lockett places the aggregate amount of the proceeds which he received at five thousand dollars.

That the statement of the *dation en paiement* is that he is justly and legally indebted to his wife in the sum of forty-six hundred dollars, which is made up of three different items of twenty-five hundred dollars, sixteen hundred dollars and five hundred dollars; and that, in satisfaction thereof, he gave to her, as a *dation en paiement*, five hundred acres of land, with the buildings and improvements thereon, at the valuation of four thousand dollars; and a small tract of woodland adjoining at the valuation of three hundred dollars—ten head of stock cattle and two mares, covering the remaining three hundred dollars, thus squaring their accounts.

That, on the 13th of June, 1883, previously, Henry P. Lockett acquired the entire Ashbourn plantation—a portion of which he gave in payment to his wife—containing eighteen hundred acres, for the

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consideration of four thousand dollars, receiving only a quit-claim deed therefor.

The truth of the recitals of these acts is not impeached by other evidence, and, for the purpose of the argument, they may be adopted as established facts.

This was the condition of things at the time Henry P. Lockett commenced negotiations with the mortgage company for a loan of twenty-two hundred dollars, predicated upon a proposed hypothecation of the entire Ashbourne plantation. Finding the wife's legal mortgage interfered, her relinquishment thereof was procured—her title by *dation en paiement* having apparently escaped attention.

While the renunciation recites it to be a fact that Mrs. Lockett had received "full payment" of her mortgage claim against her husband, the fact is that she did not receive any part thereof; but this statement of the wife is not inconsistent with the truth, because she had received full payment through the instrumentality of the *dation*.

From the record it appears that no reference whatever is made in the act of mortgage to the defendant of the aforesaid renunciation. Mrs. Lockett did not sign the act making a formal renunciation of her right of mortgage or her right of property. There is no certificate of mortgages appended to the act, and no waiver of the production of such a certificate is found in the act. The mortgage covers and includes the entire Ashbourn plantation, the five hundred acres given to the wife, as well as the nine hundred belonging to the husband.

Counsel for the defendant insists that his client was a stranger to both the husband and the wife; that the husband had a legal right to liquidate the indebtedness of his wife, and that she had a legal right to acknowledge payment and direct the cancellation of her legal mortgage.

And at the same time he insists that the provisions of R. C. C. 129 do not apply, as they refer exclusively to a wife's renunciation in favor of a third person; and, further, that they do not apply to the cancellation of a wife's legal mortgage.

The renunciation of Mrs. Lockett was only an act under private signature authorized and signed by her husband out of the presence of the attesting witnesses; and it was neither filed for record nor recorded until three days subsequent to the execution of the mortgage to the defendant.

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The record fails to disclose the cancellation of the wife's mortgage at all, notwithstanding the relinquishment purports to have been made, "because the Canadian and American Mortgage and Trust Company, Limited, is *about* to make a loan to H. P. Lockett, and is unwilling to make it unless the fact of payment of this mortgage be entered of record, so as to show the lien of said company will be absolutely the first lien."

But, for the present, leaving these facts out of view, as well as the question of her title in virtue of the *dation en paiement*, let us consider whether the renunciation, as such, was good in law, this being the necessary starting point in the controversy.

The general rule of law is that "inscriptions of mortgage and privileges are erased by the consent of the parties interested and having capacity for that purpose; this consent is to be evidenced by a release, or by a receipt given on the records of the court," etc. R. C. C. 3871.

But R. C. C. 129 imposes the additional requirement that "married women above the age of twenty-one years shall have the right, with the consent of their husbands, by act passed before a notary public, to renounce in favor of third persons their matrimonial, dotal, paraphernal and other rights. The notary public, before receiving the signature of any married woman, shall detail in the act, and explain verbally to said married woman, out of the presence of her husband, the nature of her rights, and of the contract she agrees to."

This is a new article, first incorporated in the Code of 1870; and the same phraseology is found repeated in three sections of the Revised Statutes of 1870, viz.: 1717, 2518 and 3985.

The language of that article is general, that married women shall have the right to renounce in favor of third persons, their matrimonial, dotal, paraphernal and other rights, only upon compliance with the conditions therein imposed.

The law-maker has seen fit to impose these conditions and requirements, as a means of determining the capacity of a married woman to make a proposed renunciation; and it is the plain duty of this court to see that they have been complied with.

Succession of Montgomery, 44 An. 373, which is cited by the plaintiff's counsel, seems to be exactly applicable.

The opening statement of the opinion is as follows, viz.:

"This controversy involves the validity of a wife's renunciation

of her rights against her husband, and the property mortgaged by him, in favor of a creditor."

The only question was as to the validity of the wife's renunciation, which was contained in an authentic act of mortgage, wherein she intervened for the purpose of making the renunciation—the recital being that "she appears and declares that she renounces unto G. Malin Davis her right of mortgage on said property, and agrees that his mortgage shall take precedence of hers; and she further declares that she has no other mortgage against her husband's property, recorded or otherwise."

After quoting R. C. C. 129 the court said:

"A simple reading of the provision forcibly impresses upon the mind that the law permits a renunciation, provided the notary before receiving the signature of the married woman explains to her verbally, out of the presence of her husband, (1) the nature of her rights and that of the contract she agrees to; (2) that he shows that he has done so, by detailing in the act the nature of the double information which he has thus given her, and that the formalities have been observed.

"It is not until after he has so furnished her this information and thus detailed what has occurred that he has the authority to receive her signature.

"A compliance with those requirements is an essential condition precedent for the validity of such renunciations, which is exacted for the protection of married who are *inopes concilii*, in order to shield them as effectually as practicable from marital pressure, intimidation or captation.

"It is nothing but just that they should previously know their rights, just as they are, with precision; and it is for that purpose that the notary is required to inform them, and to show how he has done so, in order that they may not afterward deny that they had full knowledge of those rights, the whole, of course, to occur out of the presence of the husband.

"The proof which the law allows to show that those formalities have been gone through faithfully is the notary's recital in the act."

After citing various authorities applicable to similar provisions of law, the opinion concludes thus, viz.:

"In the instant case it is more than apparent that the renunciation is fatally defective, not only because the notary did not detail

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the rights, the double information which is to be given by him to the wife, but also because it does not appear that what transpired, if anything of that kind did, occurred out of the presence of the husband.

"A failure to have made a recital in the act of those circumstances implies that the formalities were not fulfilled, and carries the nullity of the renunciation."

In support of that interpretation of the Art. 129, the following authorities were cited, viz.: Succession of Gremillon, 4 An. 411; Ashford vs. Tibbitts, 11 An. 178; Locke vs. Lafitte, 28 An. 282; Pilcher vs. Schwartz, *Id.* 494.

The opinion is clear, logical and perfectly conclusive, and it applies, with much greater force, to the renunciation of the plaintiffs' mother. Because it is under private signature. It was signed at the request and in the presence of the husband, alone, and out of the presence even of the attesting witnesses. It was not attached to or made part of the act of mortgage. She did not appear and sign the act of mortgage, nor intervene therein for the purpose of having it recognized and authenticated.

There can be no doubt of the utter invalidity of the document which is relied upon as a renunciation by the plaintiffs' mother of her right of legal mortgage on the property in controversy.

The next question for our consideration is the title of the plaintiffs' mother, which she acquired by the *dation en paiement* from her husband, in satisfaction of her paraphernal claims, and secured by the aforesaid legal mortgage.

The paraphernal indebtedness of the wife being fully established, and her mortgage ascertained to have been in *proprio vigore* at the date her husband consented the special mortgage in favor of the defendant; and it having the retroactive effect of a consideration for the *dation en paiement*—we must look elsewhere for a solution of the present controversy. And the defendant's counsel points to the former litigation between their client and plaintiffs' mother, as solving the difficulty—relying on the compromise settlement therein made as an estoppel, and the judgment therein rendered as constituting *res adjudicata*.

But, on the other hand, the plaintiffs insist that their mother was, at the time, under the coverture of marriage, and that her mind was operated upon by undue marital influence and coercion which were

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exercised by her husband, as well as by the threats of a criminal prosecution against her husband, at the instance of the company—through which instrumentalities she was actuated in consenting to the apparent abandonment of her rights, and the rendition of a judgment against her in said litigation.

The following is the full text of the agreement on which the settlement of said suit and judgment was predicated, viz.:

“A.”

No. 3846.	}	Twelfth Judicial District Court, Parish of Rapides, State of Louisiana.
Mrs. Cornelia Luckett		
vs.		
Canadian and American Mortgage and Trust Company.		

Now appears Mrs. Cornelia Luckett, wife, and her husband, Henry P. Luckett, who joins herein for the purpose of authorizing his said wife, who admits that the property claimed in her petition, filed in this injunction suit, is the property of her husband, H. P. Luckett; she moreover withdraws and disclaims any right, title and interest in said property, to-wit: A certain tract of land in the parish of Rapides, La., containing 500 acres of land, with all the buildings thereon, bounded above by lands of Mrs. R. L. Luckett, below by lands of J. P. Hickman, and fronting on Red river; and also another tract of woodland adjoining the above tract, bounded north by Landry Baillio, south by lands of Sanford, and east by the first above described lands, and west by lands of the Bertrand plantation, *being the identical property described in the dation in payment of Henry P. Luckett, husband to Cornelia Luckett, wife, dated 8th day of January, 1885, and recorded in Conveyance Book H, p. 493, on the 15th day of January, 1885. (Italics ours.)* That when she signed the act of release, dated October 20, 1888, and recorded in Mortgage Book N, p. 284, she was then aware that her husband, Henry P. Luckett, was about to mortgage the “Ashborne” plantation, upon which he resides, on the right descending bank of Red river, about twelve miles above Alexandria, La., bounded on the north by Red river, on the south by lands of the estates of Willis Bonner, Wm. L. Sanford and James, on the east by lands of James P. Hickman and on the west by lands of Dr. R. L. Luckett, and he did mortgage the said plantation to the Canadian and American Mortgage Company, the above-described plantation containing 1400 acres of land, and that

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she executed her release to her husband in order that her husband might borrow the sum of twenty-two hundred dollars from the aforesaid mortgage company upon aforesaid plantation, as set forth in the act of mortgage executed by him in favor of the Canadian and American Mortgage Company for twenty-two hundred dollars, dated October 22, 1885, and recorded November 5, 1888, in Mortgage Book N, p. 285.

She now appears in open court and moves to dismiss her suit of injunction herein filed, and that the court shall render such judgment as her admissions warrant, and that judgment be rendered in favor of defendants so as to effect a settlement of the difference between the said company and her husband in this particular case. (*Italics ours.*)

(Signed)

CORNELIA LUCKETT.

Authorized by me, H. P. Luckett.

Rapides Parish, La., October 27, 1891.

Witnesses: John C. Ryan, John P. McGhee.

With reference to the influences that operated on the mind of Mrs. Luckett in the execution of this instrument we have collated the following pertinent statements of the witnesses, and for convenience take the liberty of making extracts from the brief of defendant's counsel, viz.:

"R. J. Bowman, one of Mrs. Luckett's attorneys, on a former trial testified substantially as follows: 'I never saw this document marked "A." Captain White was associated with me in this business. After this injunction suit of Mrs. Luckett was brought, Mr. Daigre came to see me with some documents, consisting of an affidavit among other things, in which Mr. Luckett made an affidavit that this property was his own property; this affidavit was made preparatory to the mortgage which was given. Mr. Daigre also represented that the Canadian and American Mortgage and Trust Company would prosecute Mr. Luckett on this affidavit. I and Captain White considered over the matter, and we advised Mr. Luckett to have the suit withdrawn. We did not see Mrs. Luckett in reference to the withdrawal of the suit at all.' Again: 'I have no recollection of seeing Mrs. Luckett in reference to the withdrawal of the suit. I knew the suit was dismissed, but did not know on what terms. Captain White and I abandoned the matter. It was the threat of the prosecution and the affidavit itself which caused us to give this advice to Mr. Luckett.

I thought it placed him in a false position.' On cross-examination he states that: 'There was no representative of the company present when we advised Mr. Luckett to dismiss the suit.'

"With reference to the same document Mr. Luckett, the husband and the person charged to have exercised violence and coercion, says: 'Mr. Bowman told me, or advised me, to withdraw the injunction. I laid the case before my wife and told her that I was in this position, and we persuaded her to sign this instrument. This paper was signed in Alexandria. I didn't take it up home and have my wife to sign it up there. I had a talk with my wife about signing it at home before she came down. She didn't want to do it, but she did it. I insisted upon her doing it. I told (her) of these threats and the whole circumstances.'

"On cross-examination the same witness says: 'There was an agreement between the attorneys representing the company and myself by which I was to get an extension of time, and I paid their fees. This was not one of the reasons that induced me to request my wife to sign document marked "A." *The real reason was because I wanted to get a loan from Mr. Jones in another company.* I told my wife that they threatened a criminal prosecution, and that was the reason she signed it. I was not fearful of a criminal prosecution, but I thought they might attempt something of the kind as they had threatened. Mr. Jones wrote me from Memphis that they could do that. Mr. Ryan or Mr. Daigre, one, hinted that they could do that. *This is all in the nature of a threatened prosecution that I know of.* I don't know that I said anything to my wife about this threatened prosecution, but she was told of it. I don't recollect having stated to her that if she didn't sign it I would be prosecuted. I don't know who did tell her, but some of the lawyers told her. I was not present when anybody told her.' However, on final cross-examination the witness corrected the last statement by stating that he told his wife of the threatened prosecution prior to the signing of the document 'A.' "

The testimony in behalf of the defendant is of a negative character, and we append the following extracts, viz.:

"H. L. Daigre testified in behalf of the defendant as follows: 'This document "A" is in my handwriting. I was not present when Mrs. Luckett signed it. I never had any conversation with Mrs. Luckett at all in regard to her signing that document. I used no

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persuasion or threats of any kind, because I did not see her any; didn't talk with her in relation to it. I drew up this document and it was submitted to Mr. Bowman and was afterward given to Mr. Ryan, the associate counsel in this case, and the next time I saw it, it was signed by Mrs. and Mr. Lockett. I used no undue influence, no threats and nothing to get this document signed.' On cross-examination he further states that he did intimate to Mr. Bowman that if this injunction suit was pressed that the loan company would prosecute Mr. Lockett, and at the same time that the company had instructed him that no intimidation or coercion should be used, and for him not to do anything that would have that appearance. He finally states: 'I did not have a talk with Mr. Bowman as detailed by him.'"

Mr. Ryan, the other attorney, fully corroborated Mr. Daigre on this point, simply stating that he never used any threats or inducements to induce Mrs. Lockett to sign document "A." That he never spoke about it.

But the statement of Mr. Bowman is direct and positive to the effect that "it was the threat of the prosecution and the affidavit itself which caused us to give this advice to Mr. Lockett. I thought it placed him in a false position."

Mr. Lockett's statement is equally clear and emphatic that he told his wife of the position he was in, and "persuaded her to sign this instrument." That he insisted upon her doing it. That he told her "of these threats and the whole circumstances." That he told her that he was "threatened with a criminal prosecution and that was the reason she signed it."

Accepting the statements of Messrs. Daigre and Ryan as perfectly true, it is only to the effect that they did not see or speak with Mrs. Lockett on the subject; yet it is undoubtedly shown that Mr. Daigre, as attorney for the defendant, went to Mr. Bowman, as attorney for Mrs. Lockett, with the affidavit of H. P. Lockett; and it soon afterward transpired that the suit was withdrawn under the circumstances detailed in document "A."

To our thinking, this evidence clearly establishes that Mrs. Lockett's consent to the terms proposed in document "A" was obtained through the marital influence and coercion of her husband, and that in signing it her mind was influenced by the fear of a criminal prosecution being inaugurated against her husband, at the instance of

the defendant. That while it does not appear from the evidence, that the defendant's attorneys ever approached either H. P. Luckett or his wife on the subject, yet it is true that the evidence substantially shows that the defendant set in motion the causes which brought about the desired result.

In the light of all the evidence can this court affirm that document "A" can serve as the foundation of a valid and binding judgment against a married woman; or, can operate as an equitable estoppel against the judicial assertion of her rights by her children?

It is our deliberate opinion that we can not.

The agreement only purports to be an admission that the property she claimed was that of her husband; a withdrawal of her right, title and interest therein; and that her renunciation was intended to operate as an inducement to the defendant to make a loan to her husband. It does not express any consideration received. It is intended as an abandonment of her rights altogether. She has never been paid a tithe of the five thousand dollars her husband received and consumed. As the judgment of dismissal and disallowance of her title can not be any more substantial than the foundation on which it was based, the same is altogether unavailing either as *res judicata* or estoppel against the plaintiffs as heirs at law of Mrs. Luckett.

There is a total absence of proof that defendant's loan inured to Mrs. Luckett's benefit; on the contrary, the proof is perfectly clear that it did not inure to her benefit, or that of her separate property.

In our opinion there is scarcely any point of similitude between this case, in point of fact, and the cases of Barron vs. Sollibellos, 26 An. 289; Thornhill vs. Bank, 34 An. 1171; Calhoun vs. Lane, 39 An. 594; Sentell vs. Stark, 37 An. 679. It is elementary that a married woman can not bind herself for her husband's debts. R. C. C. 2398.

And in an early case which has been frequently since affirmed, it was very correctly held, that a married woman's contract of suretyship for her husband, on which a judgment has been rendered, remains liable to the same objection as the obnoxious obligation, as long as the disability lasts. Medart vs. Fansnatch, 15 An. 621.

And while it is true that our predecessors said that a married woman who had made a transaction and compromise of a lawsuit would "not be listened to when saying that the debt sued on was her husband's" (26 An. 289), and that statement has been since re-

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peated with apparent approval in some more recent cases; yet we find it difficult to perceive any reason why a greater degree of sanctity should attach to a compromise than to a confession of an ordinary judgment.

And it has often been held that a married woman is not estopped by a confession of judgment from the assertion of her rights. *Strother vs. Hamlet*, 28 An. 839; *Dancy vs. Martin et al.*, 23 An. 323; *Raines vs. Burbridge*, 15 An. 628; *Succession of Andrus*, 34 An. 1065; *Bowman vs. Kaufman*, 30 An. 1024.

We are of the opinion that the *dictum* of that case is not in keeping with the jurisprudence of this court, and should be so modified as to conform thereto. It is quite evident that this is the clear import of our opinion in *Calhoun vs. Lane* when carefully considered, in the light of the facts therein developed.

On the question of estoppel against a married woman our jurisprudence is uniform and consistent.

In *Harang vs. Blanc*, 34 An. 632, the court puts the proposition thus:

"It is also urged that the plaintiff is estopped by reason of her conveyance to defendant, and the declarations made in the acts, from denying its truth and seeking its nullity. It has often been held that when a married woman seeks to avoid an act, which she attacks upon the ground that it contravenes the provisions of a prohibitory law designed for her protection against a marital influence, that the principle of estoppel, as usually recognized, is not applicable."

Chaffe vs. Oliver, 33 An. 1009, is to the same effect, citing: *Bisland vs. Provosty*, 14 An. 169; *Leblanc vs. Bouchereau*, 16 An. 11; *Provost vs. Provost*, 5 An. 572; *McIntosh vs. Smith*, 2 An. 756; *Theriet & Baron vs. Voorhies*, 12 An. 852; *Cuny vs. Brown*, 12 Rob. 84; *Pascal vs. Sauvinet*, 1 An. 428; *Firemen's Insurance Company of New Orleans vs. Julia Louisa Cross*, 4 Rob. 508.

And we think it quite evident that the defendant's case does not fall within the exception therein stated with respect to the "rights of innocent third persons who have acted in good faith upon the apparent validity of such transactions."

The authority of those adjudications was recently recognized in *Vicknair vs. Trosclair*, 45 An. 377.

Having made a careful examination and study of this case we are of the opinion that neither of the pleas of *res adjudicata* or estoppel are good.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

The application proceeds upon the theory that our opinion is, as charged, "in direct conflict with previous adjudications of this court on the doctrine of *res adjudicata* and estoppel as applied to married women"—relying upon the following decisions, viz.:

Barron vs. Sollibellos, 26 An. 289; Thornhill vs. Bank, 34 An. 1176; Sentell vs. Stark, 37 An. 684; Calhoun vs. Lane, 39 An. 595.

All of those cases are particularly referred to in our opinion and commented upon, and we stated our conclusion to be that the expression employed in the Sollibellos case in which a married woman had made a transaction and compromise of a lawsuit that she would "not be listened to when saying that the debt sued on was her husband's" was "not in keeping with the jurisprudence of this court and should be so modified as to conform thereto."

Though it is admitted in our opinion that the *dictum* of the court in that case had been "since repeated with apparent approval."

Recapitulating the substance of those decisions as they are related in the Calhoun case, it has pleased counsel to make this statement, viz.:

"Counsel for the plaintiff contended in this court, that on the question of the effect of judgments, as against married women, the jurisprudence left the matter in great doubt; and we submit that the decision in this case leaves the question in greater confusion than the prior adjudications of this court."

Let us see how the matter stands.

Counsel's position is, that our "opinion is in direct conflict with previous adjudications"—citing the cases—and in the next sentence he informs us that "the jurisprudence has left the matter *in great doubt*;" that is to say, the legal effect of judgments against married women are left in great doubt.

The plain significance of his proposition is, that the duty is imposed upon this court to relieve the question of the doubt in which it was involved.

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Certainly the court is not a proper subject of criticism for having attempted to discharge this duty to the best of their ability.

Judging of his complaint by the quotations he has collated from the cases cited, the inference would naturally be, that he was willing to affirm the correctness of the proposition announced in the *Sollibellos* case, that a married woman who had made a transaction and compromise "would not be listened to when saying that the debt sued on was that of her husband;" but, on the contrary, we find from his brief that his theory is, that "those cases go to the extent of holding (and this is the plain purpose of those decisions) that, as to matters of fact, married women are concluded by judgments, and the right to assail them is limited to cases where marital coercion and influence are charged, *and satisfactorily proved.*"

Now, if we mistake not, that is just exactly what our opinion holds. That was its definite purpose, and the object had in view. As we understand the *Sollibellos* case, it is distinctly announced that a married woman who had made a transaction and compromise of a lawsuit "*would not be listened to when saying that the debt sued on was her husband's,*" and the plain meaning of that statement is that she would not be permitted to introduce proof of that fact.

While, just to the contrary, counsel's proposition is that married women are concluded by judgments, and "the right to assail them is limited to cases when marital coercion and influence are charged and satisfactorily proved."

It seems to us that the court is precisely in accord with counsel's views; and, perfectly agreeing with him in the statement that the jurisprudence had left the matter in great doubt, we sought to relieve it thereof, and approved of the introduction of the proof of marital influence and coercion.

Having approved of the introduction of such evidence, and considered and found it sufficient to sustain the charge, our opinion declared, in the language of counsel, that it had been "*satisfactorily proved.*"

It is, therefore, clear that the difference between counsel and the court is not as to a question of law, but a question of fact. Was there satisfactory evidence of marital influence and coercion on the part of the husband? We thought so.

In our opinion we stated that there was no real distinction between a compromise and a confession of judgment, and that one was quite

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as much subject to attack as the other. To this view we still adhere, and in this view we understand counsel to concur.

Indeed, conceding that confessions of judgment are open to investigation by married women, on the charge of marital influence and coercion, for a stronger reason should a transaction and compromise be likewise open to investigation, because it is only by a fiction of law that the latter have attributed to them "the authority of things adjudged."

But the point upon which our opinion lays the greatest stress is that there was, in point of fact, no compromise of Mrs. Luckett's rights. That she did not receive a single dollar of consideration for the supposed relinquishment of her paraphernal rights and claims. That, through the effect of the marital influence of her husband, she signed a renunciation, and that it was absolutely null and void, because it was not made according to the provisions of the Code. That she made a transaction and compromise of the suit against her subsequently, which was superinduced by the persuasion of her husband and his representations to the effect that he was threatened with a criminal prosecution by the mortgage company.

Our examination of the record and the law, since this application was filed, has only served to strengthen and confirm us in the conclusions at which we had at first arrived.

No. 11,854.

HEIRS AND LEGAL REPRESENTATIVES OF JAMES B. WILLIAMS, DECEASED, VS. W. P. DOUGLASS, SHERIFF, ET AL.

In case there is a stipulation in act of mortgage to the effect that if any one of the series of notes thereby secured shall not be promptly paid at its maturity, all of the remaining instalments shall at once become due and exigible at the option of the holder and mortgagee; and he, in the exercise of that option, shall precipitate the maturity of the notes not due, by executory proceedings against the mortgaged property, he must, necessarily, incur the corresponding obligation by remitting all of the capitalized and unearned interest, at the date of default of the debtor and mortgagor.

The alleged prematurity of the issuance of a writ of seizure and sale is no ground for injunction. Injury, or at least a well-grounded apprehension of it, can alone justify a resort to the extraordinary writ of injunction against a writ of seizure and sale.

A PPEAL from the Fifth Judicial District Court for the Parish of Morehouse. *Potts, J.*

47	1277
49	125
47	1277
104	41
47	1277
113	196
47	1277
118	740

Heirs of Williams vs. Sheriff, et al.

C. J. Boatner and E. T. Lamkin for Plaintiffs, Appellants.

J. C. Pugh, Bussey & Naff and H. R. Boyd, for Defendants Appellees.

Argued and submitted June 13, 1895.

Opinion handed down June 21, 1895.

Opinion refusing rehearing June 29, 1895.

The opinion of the court was delivered by

WATKINS, J. As there is a very clear presentation of plaintiffs' case made in the briefs of their counsel we extract and reproduce it thus:

"Plaintiffs, the widow and heirs of the late Jas. B. Williams, of Morehouse parish, obtained in this case a writ of injunction against the execution by executory process of an act of mortgage executed by decedent on the 24th of May, 1889, in favor of Francis Smith, Caldwell & Co., to secure the payment of the following promissory notes:

One for two thousand six hundred and four dollars and eighty cents, due January 1, 1890.

One for three thousand six hundred and fifty dollars, due January 1, 1891.

One for four thousand five hundred and fifty dollars, due January 1, 1892.

One for four thousand three hundred and fifty dollars, due January 1, 1893.

One for four thousand one hundred and fifty dollars, due January 1, 1894.

One for three thousand nine hundred and fifty dollars, due January 1, 1895.

One for three thousand seven hundred and fifty dollars, due January 1, 1896.

One for four thousand and fifty dollars, due January 1, 1897.

One for four thousand three hundred dollars, due January 1, 1898.

One for eleven thousand dollars, due January 1, 1899.

Amounting in the aggregate to the sum of forty-six thousand

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three hundred and fifty-four dollars and eighty cents, and all bearing interest at eight per cent. per annum after their respective maturities.

The injunction was obtained on the following grounds:

First. That although the mortgagors executed a mortgage to secure the payment of notes amounting in the aggregate to forty-six thousand three hundred and fifty-four dollars and eighty cents, they only received, and the mortgage so recites, the sum of twenty-seven thousand five hundred dollars. That the difference between the sum received and the face of the notes represents usurious interest, which was added to the amount received and included in the face of the notes. That the said sum of eighteen thousand eight hundred and fifty-four dollars and eighty cents, being the excess of the amount actually received, and which is composed of usurious interest charges on the sum received, is not due by them, because this amount could only be due at the expiration of the period of time for which said loan was obtained, and the same was to run, viz.: the 1st of January, 1899. That the note due January 1, 1890, amounting to two thousand six hundred and four dollars and eighty cents; that due January 1, 1891, amounting to two thousand eight hundred and fifty dollars, and that due January 1, 1892, amounting to four thousand five hundred and fifty dollars, were paid in full at their respective maturities, and that a payment of two thousand four hundred and three dollars in addition was made by Mrs. Williams on the note due January 1, 1893, making an aggregate of thirteen thousand two hundred and seven dollars and eighty cents which has been paid on account of said loan of twenty-seven thousand five hundred dollars, and which would leave a balance of only about fourteen thousand dollars unpaid, excluding the amount mentioned as usurious interest.

It is further alleged that the deceased, James B. Williams, only acknowledged an indebtedness of twenty-seven thousand five hundred dollars to Francis Smith, Caldwell & Co., in the act of mortgage, although the notes executed and paraphed and identified with the same represent the aggregate sum of forty-six thousand three hundred and fifty-four dollars and eighty cents, which difference, as above set forth, is interest anticipated on the principal sum advanced, supposing and calculating that said loan would continue or run until January 1, 1899, and that by reason of the alleged transfer and assignment of said notes and mortgage by the mortgagees, Francis Smith,

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Caldwell & Co., to the American Freehold Land Mortgage Company, of London, Limited, and the latter's procedure and attempt to terminate the time for which said loan was made and was to mature, the aforesaid sum, and which is interest on the sum of twenty-seven thousand five hundred dollars, less the sum paid and hereinabove set forth, and up to the date of said payments since the maturity of the note due January 1, 1898, and upon which a payment was made of two thousand four hundred and three dollars.

Second. It is further alleged that the stipulations in the act of mortgage made May 24, 1898, are exceedingly onerous and of no effect and not binding, because the promise to pay interest on interest is contrary to law and vitiates the obligation.

Third, That the defendant mortgage company has proceeded under executory process against the plantations covered by the mortgage, to sell property which is not covered by the mortgage, nor rendered immovable by destination, viz.: One bay horse colt, which is not a work animal, and one thousand bushels of corn, which has been gathered, and four tons of hay, also gathered, neither of which are in any manner attached to the mortgage premises nor immovable by destination.

Fourth. That the writ of seizure and sale was prematurely issued, and before the expiration of the legal delays given to the mortgage debtors. That the writ of seizure and sale itself directs the seizure of the property above described, which is not covered by the act of mortgage, and finally, that no demand of payment of the notes was ever made at the office of Francis Smith, Caldwell & Co., at San Antonio, Tex., where the same were made payable.

An injunction was prayed for and obtained, and five hundred dollars general damages and six hundred dollars special damages, counsel fees, claimed for the wrongful issuance of the writ of seizure and sale, and the illegal execution thereof.

The defendant appeared and pleaded an exception of no cause of action, which the District Judge sustained, except as to the allegation that property had been seized under the writ not mentioned in the act of mortgage, and not immovable by destination. Upon this point he held that plaintiffs were entitled to introduce evidence.

The defendant thereupon answered to so much of plaintiffs' petition as is not covered by the decree of the court on the exception of no cause of action. Averred that the corn and all the live stock

that was seized under the writ enjoined were placed on, or were raised on the plantation, seized for the purpose of being used thereon, and were necessary for the use of said plantation, and were immovable by destination, and subject to seizure under the writ. They denied that plaintiffs were in any manner damaged by the seizure in this suit.

Wherefore, they pray for dissolution of the injunction, and that the sale be proceeded with.

The foregoing statement admits and shows that the notes falling due on January 1, 1890; January 1, 1891; January, 1892, respectively, were fully and completely paid and discharged; and that the sum of \$2403 was paid on the note which went to maturity on the 1st of January, 1893.

Consequently we are dealing with the balance due on the fourth note last mentioned, and the remaining six of the series.

The following is the synopsis of the claims of the plaintiffs, as they are appreciated by defendant's counsel and reproduced in their brief, and which we have extracted therefrom for convenient reference, viz.:

While the petition is vague and indefinite, possibly by liberal construction it may be said to present the following propositions:

1. That it is not lawful to charge more than 8 per cent. interest, even though the same be capitalized in the face of the notes.
2. That a negotiable promissory note, due in the future, according to its terms, can not be brought to an immediate maturity through a clause in the mortgage given to secure the same, authorizing the mortgagee to declare the debt or note due upon default of any of the provisions found in the mortgage.
3. That corn, hay, fodder and other things of a like nature are not immovable, and not therefore subject to the mortgage.
4. That the advertisement of property, seized under executory process, on the day of seizure, even though thirty-three clear days intervened between the seizure and sale, is illegal, null and void.
5. That where the defendant resides more than twenty miles from the judge granting the order, a seizure made on the fourth day before notice is absolutely null and void, even though the required time has elapsed before the advertisement, and where the record shows that the defendants have appealed from the order of seizure and sale.

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6. That a presentment of the mortgage notes and a demand of payment at the place designated must be alleged and proved to authorize executory process.

On the trial proof was administered, a judgment rendered dissolving plaintiffs' injunction, without damages, requiring the sheriff to proceed with the sale, and from that judgment the plaintiffs' have appealed.

I.

The plaintiffs' first and principal proposition is that of the aggregate sum of forty-six thousand three hundred and fifty-four dollars and eighty cents, represented by the ten notes, only twenty-seven thousand five hundred dollars were borrowed of the mortgagees—the difference of eighteen thousand eight hundred and fifty-four dollars and eighty cents representing illegal and usurious interest. That having paid thirteen thousand two hundred and seven dollars and eighty cents, this amount is to be credited upon the said principal, and that after making this credit there will remain a balance of only fourteen thousand dollars due.

This statement is erroneous and inconsistent with the plaintiffs' own admissions to the effect that the three first and a portion of the fourth notes had been paid by the mortgagor prior to the issuance of the order of seizure and sale. Consequently there was no payment *on account* of the principal as a whole. On the 10th of December, 1894, when the order of seizure was given, there was but the balance of one note due—six not being yet due. And the contention of the mortgage company is that by a clause in the act of mortgage the default of the mortgagor in making payment of any one of the notes matured and precipitated the payment of the remainder of the series.

As none of the series bear interest until after maturity the controversy is practically narrowed to whether the defendant is entitled to the *entire amount* of the notes as they stand, or the plaintiffs to have the *unearned interest* deducted therefrom.

The clause in the act of mortgage which is relied upon is as follows, viz.:

"If said notes hereby secured or any one of them are not promptly paid at maturity, then all the notes remaining unpaid at the time of such default and all interest thereon shall at the option

of the holders of said notes and without any notice to appearers be deemed due and payable."

The question of law thereon raised is whether a negotiable promissory note which on its face is due in the future can be brought to its maturity through stipulation in the act of mortgage securing its payment, that a simple default in discharging a prior number of the series shall have that effect.

This is quite an unfamiliar proposition to this court, though it and other analogous questions have been decided frequently in other jurisdictions. We will content ourselves with citing the authorities *pro* and *con*, without aligning the court on either side of the controversy for the present: *Railway Company vs. Sprague*, 103 U. S. 761; *White vs. Miller*, 52 Minn. 367; *McClelland vs. Bishop*, 42 Ohio St. 113; *Wheeler Manufacturing Company vs. Howard*, 28 Fed. Rep. 74; *Noell vs. Gaines*, 68 Mo. 649; *Chambers vs. Marks*, 93 Ala. 412; *Jones on Mortgages*, Secs. 1179, 1175; *Buchanan vs. Insurance Company*, 96 Ind. 510; *Gregory vs. Marks*, 8 Bissel, 44; 62 Mo. 440; 14 Wis. 313; 73 Texas, 196.

In our own reports we find some adjudications which have some bearing on the question, though not decisive of it, and amongst the number we cite the following, viz.: *Broadwell vs. Rodrigues*, 18 An. 77; *Ives and Wife vs. Citizens Bank*, 15 An. 83; *McDonald vs. Gailand*, 7 An. 143; *LeBlanc vs. Dubroca*, 6 An. 362; *Mullen vs. Harding*, 12 An. 271; *Jouet vs. Mortimer*, 29 An. 206; *New Orleans Mutual Insurance Company vs. Bagley*, 19 An. 89; *Martin vs. Sheriff*, 37 An. 766; *Blanks vs. Insurance Company*, 36 An. 599; *Edson vs. Insurance Company*, 35 An. 353.

But possibly the strongest and most pertinent case is that of *Stein vs. Brunner*, 42 An. 722. For the statement that this court had been relieved from the necessity of deciding whether the maturity of the notes not due can be thus precipitated, in so far as the capital is concerned, we refer to the following extract from the brief of plaintiffs' counsel, viz.:

"Certainly it can not be contended that the mortgagees have not the right to avail themselves of the option reserved in the contract, 'that said notes, and without any notice to the makers, shall be deemed due and payable;' but the right to demand the return of the money which they have loaned, with the interest stipulated thereon, certainly should not be so construed as to give them the

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right of speculation on their unfortunate debtors, and to demand, not only the instant return of the loan, but the payment of interest upon it for four years thereafter."

On the contrary, it is insisted, on the part of the mortgage company, that it is entitled to the full value of all the unpaid notes, with eight per cent. interest after maturity, because it is "so nominated in the bond," and that neither allegation nor proof is admissible against that right.

It appears, from the declaration in the mortgage, that the mortgagor confessed himself indebted to the mortgage company in the sum of only twenty-seven thousand five hundred dollars, and with this statement it closely coupled this admission, viz.:

"Which said indebtedness is for money loaned, and is evidenced by the following promissory notes bearing even date herewith."

Then follows an enumeration of the notes—ten in number—as above related, aggregating forty-six thousand three hundred and fifty-four dollars and eighty cents in amount. That is face value.

And the act further declares that each of said notes "bears interest at the rate of eight per cent. per annum after maturity, and ten per cent. attorney's fees," etc.

It seems to us, without further evidence than this, that the conclusion is irresistible, that the notes thus described carry an interest that was computed on the face of the notes and capitalized—thus exhibiting on the face of the hypothecation an indebtedness larger than that actually loaned, by eighteen thousand eight hundred and fifty-four dollars and eighty cents.

Not only is this true, but we are of opinion that the clause in the contract relied upon by the mortgage company, for the precipitation of the notes not due, carries a similar significance.

For it declares that "if said notes hereby secured, or any one of them, are not promptly paid at maturity, then all of the notes remaining unpaid at the time of such default, and all interest thereon, shall, at the option of the holder * * * be deemed due and payable."

To what interest could that language apply, if not to that which had been capitalized and carried into the notes, in view of the fact that the notes, on their faces, bear no interest until after their maturity? And as the time of default is fixed in the contract at the date of maturity, there could not, in the nature of things, have been

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any interest made exigible thereby, because none is recoverable on the face of the notes until after maturity.

In the condition of our law and jurisprudence, it would serve no useful purpose to discuss the right of a mortgagor and borrower to contract for the payment of a greater rate of interest than eight per cent., provided it be capitalized and carried into the obligation.

We are of the opinion that it will be sufficient to merely recapitulate the authorities on that question: *R. C. C. 2924*; *Carruth vs. Carter*, 26 An. 331; *Martin vs. Sheriff*, 37 An. 766; *Bank vs. Reagan*, 40 An. 17; *American Homestead Company vs. Linigan*, 46 An. 1119.

The only prohibition at present contained in the Code on the subject of usurious interest is that contained in the *proviso* to Art. 2924, viz.: "provided such obligation shall not bear more than eight per cent. per annum after maturity until paid."

This provision of law has been observed by the contracting parties in the contract before us. Finding the engagement of the mortgage debtor to pay to the creditor company a *bonus* for the loan to be a legal and valid contract, the plaintiffs are entitled to no relief against that which they have paid, in discharge of the three notes first maturing and a portion of the fourth. The investigation must, therefore, be limited to the question of reduction, if any, that is to be made on the remainder of the series of notes.

There being unpaid a portion of the fourth note, falling due on the 1st of January, 1893, and the whole of the deferred payments became due by virtue of the terms of the contract; hence the entire indebtedness of the deceased bears eight per cent. interest per annum from the date of his default. But, if the plaintiffs' theory in respect to *unearned interest* be accepted and maintained, they are entitled to a reduction of ten per cent. *per annum* on the principal, the calculation to be made on the face of each of the notes remaining unpaid.

As observed *supra*, we think it sufficiently appears from the recitals of the act of mortgage that ten per cent. per annum was calculated upon each of the ten instalments of the debt, from the date of the execution of the notes and mortgage to the date of the final maturity of the last instalment, January 1, 1899. Our conclusion is that this reduction ought to be made, because the amount of the indebtedness of the deceased, as represented by his ten notes, was

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evidently predicated upon the theory that he, as maker and borrower, should retain and use the capital during that period of time. But, having exercised the option of the covenant in the mortgage to precipitate the maturity of all the premature instalments of the debt, the mortgagee necessarily assumed the corresponding duty of remitting all the capitalized interest that was unearned at the time of the attempted exercise of that right by the seizure and sale of the mortgaged property on the 10th of December, 1894.

Were there any doubt as to the correctness of this proposition it would be completely dispelled by the statement made in the argument by one of the counsel for the mortgage company that his client was perfectly willing to remit all the unearned interest, although insisting that, on the face of the contract, plaintiffs are not legally entitled to this allowance.

This statement carries with it the admission that, as matter of fact, ten per cent. per annum had been computed and capitalized in the notes, leaving only the conclusion of law that is to be drawn therefrom by the court, and this we have already done.

II.

On the argument it was conceded that the horse was properly seized as an immovable by destination, it having been used and worked on the plantation, which was mortgaged; but plaintiffs' counsel strenuously oppose the seizure of the corn and hay, on the ground that same had been severed from the soil, and at date of seizure had been gathered and stored, and were, therefore, movable in the sense of the Code.

While it is true, and this court has so decided frequently, that corn and hay, which has been raised on the mortgaged premises, for the service and use of the plantation, is immovable by destination (C. P. 645; R. O. C. 468; Citizens Bank vs. Wiltz, 31 An. 244; Citizens Bank vs. Crooks, 21 An. 324; Well vs. Lapeyre, 38 An. 303; Barrow vs. Lapene, 30 An. 310), yet we are not disposed to put upon the law a harsh or extreme interpretation, and it is our opinion that such would be the case if we should maintain as legal and valid the seizure of the crops in question in the month of December, a time at which all farming operations are suspended.

In this respect we are of opinion that the judgment of the court *a qua* should be amended, and that the corn and hay should be released from seizure.

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III.

With regard to the alleged prematurity of the seizure under the order of seizure and sale, there is but little to be said, as it is settled by repeated adjudications of this court that this is a mere irregularity, on account of which an injunction will not be perpetuated, for the reason that no substantial benefit would be allowed, as a new writ would immediately lie under the same order of seizure. And the law does not favor a multiplicity of actions.

Injury, or at least a well-grounded apprehension of it, can alone justify a resort to this extraordinary remedy. *Morgan vs. Whitesides*, Curator, 14 La. 280; *Hudson vs. Dangerfield*, 2 La. 66; *Dayton vs. Bank*, 6 R. 20; *Aillet vs. Henry*, 2 An., 145; *Woodward vs. Dashiell*, 15 La. 184; *McDonough vs. Fost*, 1 Rob. 295; *Nash vs. Johnson*, 9 Rob. 8; *Birch vs. Bates*, 22 An. 198; *State vs. Judge*, 16 An. 392; *Gorde vs. Buford*, 14 An. 102; *Succession of Allen vs. Couret*, 25 An. 24; *Chase vs. Gas Light Co.*, 45 An. 309; *Howell vs. Butchers' Union*, 36 An. 63; *Brown vs. New Orleans*, 38 An. 517; *Butchers' Union and Slaughter House Co. vs. Howell*, 37 An. 280.

This ground of injunction is not good.

IV.

The foregoing conclusions necessitate a modification of the decree of the court *a qua* in the two particulars named.

It is therefore ordered and decreed that the judgment appealed from be and the same is hereby modified and amended so as to allow in favor of the plaintiffs a reduction of ten per cent. *per annum* on each of the six notes last falling due, and the maturity of which was precipitated by reason of the debtor's default in making payment of a portion of the fourth note of the series, to be calculated from the date of the order of seizure and sale to the 1st of January, 1899, the date of the maturity of the last note of the series, and further amended as to order that the corn and hay be released from seizure.

And it is finally ordered and decreed that as thus amended the judgment appealed from be affirmed at appellee's cost.

NICHOLLS, C. J., absent.

ON APPLICATION FOR REHEARING.

BREAUX, J. We affirm the opinion heretofore pronounced in so far as it is held that the maturing of unmaturing notes, the maturity

Heirs of Williams vs. Sheriff, et al.

of which is precipitated by the default of the debtor and the election of the creditor, does not carry with it indebtedness for the interest, although included in the note.

We amend the decree in so far as any item of interest allowed is not covered by the principle just announced.

The amount borrowed was twenty-seven thousand five hundred dollars. The principal and interest, prior to maturity (*i. e.*, the maturity originally stipulated), added to the principal, were distributed in the different notes, maturing at different dates.

The three notes maturing in 1890, 1891 and 1892 were paid; two thousand four hundred and three dollars were paid April 14, 1893, on the fourth note, which had matured January 1, 1893.

The fifth note was due January 1, 1894, and the sixth on January 1, 1895. Under the rule adopted no part of the interest prior to December 10, 1894, is to be deducted.

It is considered that the amount paid is a *fait accompli*, and that as to the remainder of the interest there was consideration, for use, to the 10th day of December, 1894, but not subsequently. Moreover, all the notes having matured, it would not be just to charge the interest added to the principal, and the eight per cent. from maturity stipulated in the notes.

Interest is due at eight per cent. *per annum* from December 10, 1894, as hereafter decreed.

It is therefore ordered, adjudged and decreed that our prior judgment is made to conform with the principle just written, and that a reduction of ten cent. *per annum* is to be computed from December 10, 1894, on each of the notes falling due, respectively, January 1, 1895, and years subsequent to that year—*i. e.*, the said rate of interest from December 14, 1894, to January 1, 1895, in note which originally was to mature on last mentioned date, and same rate annually on note which was to mature originally on January 1, 1896, and so on to the last note, which was to mature in 1899, but which owing to default of debtor and election of creditor became due December 10, 1894, and that the whole amount left as due to the defendant in injunction shall bear eight per cent. interest from December 10, 1894.

Counsel were duly notified prior to this amendment and action by this court was taken rendering it useless to grant a rehearing.

Our original decree as amended by this decree is affirmed.

No. 11,835.

REYNOLDS & HENRY CONSTRUCTION COMPANY VS. THE MAYOR AND CITY COUNCIL OF MONROE.

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Where a witness was asked by defendant to state the substance of a certain document, and the plaintiff objects, which objection is withdrawn, and then the defendant withdraws the question asked for the substance of the document, it is too late, after withdrawing the question, to ask for time to get a copy of the document.

A party can not sue the defendant on instalments growing out of the same contract when the whole amount was due when suit was first brought. He is presumed to have all that he was entitled to in the first demand.

On other points syllabus same as in 46 An. 1276, 45 An. 1024.

A PPEAL from the Fifth Judicial District Court for the Parish of Onachita. *Potts, J.*

E. T. Lamkin and C. J. Boatner for Plaintiff and Appellee.

Thomas O. Benton, City Attorney (*Stubbs & Russell* of Counsel), for Defendants, Appellants.

Argued and submitted June 7, 1895.

Opinion handed down June 17, 1895.

Rehearing refused June 29, 1895.

The opinion of the court was delivered by

McENERY, J. In order to promote the construction of the Houston Central, Arkansas & Northern Railroad through the city of Monroe, connecting with the northwestern States, the city of Monroe, in accordance with existing law, ordered an election for the purpose of ascertaining whether a five mill tax for ten years should be voted to the road. The election was held, and the tax voted. After the election the city repealed the ordinance ordering the election, which ordinance also contained the contract between the city of Monroe and the railroad company. This tax was transferred by the railroad company to plaintiff.

The city refused to promulgate the returns, but it was *mandamus*ed to do so by this court.

This present suit is for the purpose of compelling the city to levy a tax of five mills on all taxable property within the city for ten years, and in the alternative, if the five-mill tax for ten years is not allowed, then to command and order the levying of a five-mill tax for one year on the assessment roll of the year 1894.

The defences of the city as to all matters which preceded the ordering of the election, and the illegal votes cast at the election, may be eliminated from this controversy, as they have been disposed of in the suits between the same parties reported in the cases entitled *Reynolds & Henry Construction Company vs. The Mayor and City Council of Monroe*, 45 An. 1024; *State ex rel. Reynolds & Henry Construction Company vs. The Mayor and Council of Monroe*, 46 An. 1276.

The City Council was the sole judge whether or not the petition of the taxpayers, which only could be the basis of an election, was properly, legally and sufficiently signed.

And in the case of this plaintiff vs. the same defendant (46 An. 1278), we clearly intimated that the City Council was without authority to contest the validity of the election which it had ordered. Its duty in ordering the election and promulgating the returns was purely ministerial, and in that case we said: "If frauds are committed in the election of a character to vitiate the tax, or other causes exist to oppose it, the remedy is not to be sought in any discretion of the council. Instances are not infrequent of taxes of this character being resisted, nor has there been the least difficulty in finding suitable remedies where there is ground for their application, but remedy and relief is not by the refusal of the municipal authorities to perform ministerial acts."

We also stated that if the frauds existed we are without authority to examine into the validity of the election, no jurisdiction for this purpose having been conferred upon this court. *State vs. Judge Second Judicial District Court*, 13 An. 89; *State ex rel. Davis vs. Police Jury*, 43 An. 1009.

In this proceeding no taxpayer, or other party having a pecuniary interest in the payment or resisting of the tax, is complaining.

We may here add that in the case referred to, the pleas of prescription urged by the defendant were disposed of.

The only questions presented to us are whether there is evidence sufficient to show that the railroad company accepted from the

Ouachita Valley Railroad Company its subscription stock in satisfaction of the tax voted, and whether the railroad company complied in time with its contract to build the road to the extent of making connections with the Northwest, and thus earn the five-mill tax for ten years. There is no question as to the earning of the five-mill tax, as this one-year tax was an absolute bonus. This question was settled in the cases referred to. The mandamus ordering the promulgation of the votes was necessarily based on the fact that the defendant was indebted to plaintiff for the one year five-mill tax.

The defendant offered witnesses to show that a sum of seventy-five thousand dollars had been subscribed to and collected by the Ouachita Valley Railroad, which was to occupy the territory of the Houston Central, Arkansas & Northern Railroad Company, and transferred to the latter by the former in consideration of the relinquishment of the tax voted by the city. The testimony was objected to by plaintiff, and the objection sustained. Apparently the judge's reasons for rejecting the testimony are satisfactory.

But it will be unnecessary to examine closely the reasons for his ruling, as the defendant recalled and placed on the stand F. G. Hudson, plaintiff's witness, who had, at one time, possession of the books and papers of the railroad. In answer to a question of defendant's attorney, he said he had, with the assistance of F. P. Stubbs, prepared a resolution on the report made by Maj. Bright on the subject of a proposition made by him to the Ouachita Valley Railroad Company, and the board passed a resolution on the subject, which was recorded in the minutes. He was asked by the defendant if he recollected the verbiage or substance of the resolution, and answered that he recollected the substance, but not its verbiage. He was asked to state it, and this was objected to by plaintiff. The objection was sustained. Plaintiff's counsel then consented to Mr. Hudson stating the substance of the resolution, whereupon the defendant withdrew the question. The court, on the withdrawing of the question, denied the application for delay until a copy of the resolution could be obtained. This ruling was correct. The defendant had asked the witness as to his recollection of the substance of the resolution. This was all the defendant desired, and when it had an opportunity of obtaining this required information, it rejected it. It has no cause to complain. This disposes of the whole matter of the resolution, and it would be useless to notice the objection

Construction Co. vs. Mayor and Council.

thereafter urged to the questions to, and the answers of, the witness as to the disposition of the stock of the Ouachita Valley road. The defendant was not taken by surprise. One of its attorneys had assisted in preparing the resolution, and must have known of its existence; and if there was an acceptance by it of the subscription stock of the Ouachita Valley Railroad, in lieu of the tax, it was too important to his client for him to have forgotten it.

In the case of Construction Company vs. Police Jury, 44 An. 863, the police jury set up this same defence, and we found that it had no existence.

This case is reported, and the attorneys for the city must have known of the defence made by the police jury, and the existence of the resolution alluded to by Mr. Hudson. The city had ample time to procure a copy of it.

On the second ground urged by the defendant it is evident that the city owes only one year five-mill tax. The road was not completed in time so as to earn the ten-mill tax. This is virtually conceded by plaintiff in the suits reported in 45 and 46 of Annual Reports, referred to herein, in which the plaintiffs sued only for a tax of five mills for one year.

In case of Construction Company vs. Police Jury, involving almost identical issues with this, except the facts relating to the election, we said:

"Plaintiff admits that a northern connection was not made within eighteen months, as required by the ordinance, and that only the first year's tax was earned. The northern connection was made about thirty days after the time expressed in the ordinance."

The plaintiffs are not entitled to sue now for the entire tax, having abandoned it in the suits referred to. It is presumed the plaintiff will claim all that he is entitled to, which is demandable, growing out of a contract, and it is certain that he will not be permitted to divide his claim and sue the defendant in instalments.

The defendant insists, if the judgment is affirmed, that the tax be ordered collected on the rolls of 1889, and urges that the constitutional limit of taxation has been reached by the city in voting for taxes for improvements on the supposition that the tax in aid of the railroad was null and void, and would never be enforced. The plaintiff asks that it be collected on the assessment roll of 1894. It is immaterial on what assessment roll it is levied, as the contract

State ex rel. Wright vs. Judges.

does not say in what particular year it should be paid. It was the duty of the city to provide for the payment of the tax, and to have the assessment and collection made immediately after it was earned.

We will amend the judgment so as to order the assessment on the roll of 1889, and in case the limit of taxation has been reached during that year then on the roll of the year 1894.

It is therefore ordered and decreed that the judgment appealed from be amended so as to order an assessment of a tax of five mills on the rolls of the year 1889, and in case the limit of taxation should have been reached that year or that there is any other reason why the full amount of the tax so ordered assessed can not be assessed and collected on the rolls for that year, it is ordered that an assessment of a five-mill tax be made on the rolls of 1894.

In other respects the judgment is affirmed, appellee to pay costs. NICHOLLS, C. J., absent.

No. 11,865.

STATE EX REL. MRS. MATTIE L. WRIGHT VS. JUDGES OF THE FIRST
CIRCUIT COURT OF APPEALS.

Before invoking the supervisory jurisdiction of the Supreme Court, the party applying for relief must exhaust his remedies in the lower court. When it is alleged the lower court was without jurisdiction, it must appear that a plea to the jurisdiction was filed in the lower court.

APPPLICATION for a Writ of *Certiorari*.

W. A. Van Hook for Relatrix.

Submitted on briefs June 15, 1895.
Opinion handed down, June 17, 1895.
Rehearing refused June 29, 1895.

The opinion of the court was delivered by

MCENERY, J. Our supervisory jurisdiction is invoked to annul a judgment of the First Circuit Court of Appeals affirming the judgment of the District Court, partly in favor of and against relator.

Land and Improvement Co. vs. Succession of Fasnacht.

The ground for relief is the want of jurisdiction *ratione materiæ* of the court, and it is now too late to apply for the relief prayed for. The relator should have exhausted his remedies in the lower court before applying for relief.

It is therefore decreed that relator's application be dismissed.

NICHOLLS, C. J., absent.

No. 11,617.

THE GULF STATE LAND AND IMPROVEMENT COMPANY VS. SUCCESSION OF SAMUEL FASNAOHT.

The assessment of property for taxation should conform substantially, at least, to the titles giving accurate descriptions of the property of record, and to the other requisites of assessments pointed out by law. Revenue Act No. 85 of 1893, Secs. 7, 8.

The court again affirms that a valid assessment is requisite to sustain the tax sale, and the principle is applied in this case to the defective descriptions of the property assessed. Cooley on Taxation, Chap. 12, p. 275, and the line of cases on deficient descriptions.

A tax sale of property in its entirety, composed of distinct portions acquired under separate titles, will not be sustained if it is reasonably certain a smaller portion could have been sold for enough to pay unpaid taxes, interest and costs. Constitution, Art. 210; Burroughs on Taxation, Chap. 11, p. 204.

The constitutional requirement, the tax collector shall sell at the tax sale the least quantity of the property that will bring the unpaid taxes, is not fulfilled by this statement that he offers any portion that any one will buy; the offer should be of a portion specific as to quantity and location, so that the purchaser may know what he buys and that delivery may be made. *Ibid.*

Neither the administrator or attorney of a succession can surrender property by affirming a void tax sale.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Charles H. Osterberger and J. Zach. Spearing cite for Plaintiffs, Appellants: 46 An. 410; 42 An. 877.

C. McRae Selph cites for Defendant, Appellee: Cooley on Taxation, pp. 263-266; 32 An. 1006; 15 An. 15; 25 An. 504; 37 An. 60; 19 An. 185; 33 An. 520.

Argued and submitted May 11, 1895.

Opinion handed down June 3, 1895.

Rehearing refused June 27, 1895.

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Land and Improvement Co. vs. Succession of Fasnacht.

The opinion of the court was delivered by

MILLER, J. This is a suit for property alleged to have been acquired by plaintiff at a tax sale under an assessment against estate of Samuel Fasnacht. The defence is, there was no legal assessment of the property or notice to the owner of the sale, void, it is claimed, for the additional reason that for taxes amounting only to eighty dollars, the tax collector adjudicated property assessed at seven thousand five hundred dollars, the property embracing distinct portions, acquired under different titles, susceptible, it is claimed, of separate sale and sold at the tax sale in *globo* in violation of the constitutional requirement the offering and sale by the tax collector of the least portion capable of realizing the taxes due. From the judgment against plaintiff this appeal is prosecuted.

The titles by which the tax debtor, Samuel Fasnacht, acquired the property were and had been of record for years. They gave accurate descriptions, and the law requires assessments with reference to the recorded titles, or at least indicates the record as the sources of information for the successors. Acts of 1888, No. 7, Sec. 8. The assessment in this case undertook to blend in one description property the subject of distinct titles. The assessment was a tract measuring four hundred (400) feet on the Metairie road; on New Orleans shellroad, 443 feet 8 inches 3 lines; on an oblique line, 299 feet 7 inches; on rear line, parallel with New Orleans shellroad, 300 feet. It is, we think, manifest this does not locate property. With other defects neither the direction nor connection with any property of the oblique line is given, and the depth from the Metairie is not stated. The description is not at all aided by any reference to any ownership of the adjoining land. It is in proof that the tract fronting the Metairie bears a name, stated on the city map, and which it has borne for years. The requisites of an assessment are by its boundaries or divisions of United States surveys; if in cities the assessments should designate the lots according to the streets and squares, and if the land bears a name that is to be stated. Acts of 1888, Secs. 7, 8. The recorded titles state one of the portions intended to be embraced in this assessment, that is the Half-way House, as having 400 feet on the Metairie, by a depth between lines parallel to it of 400 feet; the front on the New Canal is 300 feet on a line parallel and 120 feet distant from it, and same extent in the rear; the other and adjoining portion is described as fronting 143 feet 8 inches 3 lines on the New

Land and Improvement Co. vs. Succession of Fasnacht.

Canal shellroad, triangular in form, with a depth of 262 feet 1 inch on the side toward the Metairie road, and adjoining the property of Read, purchased by the Canal Bank from Redon. There is no reason why the description in the two recorded acts should not have been followed, and the assessment, deficient as it is, in our view, in material respects, can not be accepted as equivalent to the description in the deeds the law indicates as the guide.

There is the other objection to the tax sale that the property was adjudicated in its entirety, made up of two distinct portions, acquired by separate conveyances, that is to say, property for which over twenty-one thousand dollars was paid, and which was assessed at seven thousand five hundred dollars, was adjudicated for eighty dollars to pay an inconsiderable amount of taxes. It must appear difficult to maintain such a tax title. Without the stringent provision in the State Constitution, it is not likely such a title would stand. The gross inadequacy of price, of course not enough in itself to vitiate the sale, but with other elements, would militate seriously against any such title. As Burroughs puts it, dealing with statutory requisites not stronger, if as emphatic as our Constitution, requiring the least quantity to be sold, the same principle would be enforced by the courts if there was no statute. The general principle as to sales by sheriffs and tax collectors is often enforced on grounds of equity and reason, which forbids selling a whole tract when a few acres would be sufficient. Burroughs on Taxation, Chap. 15, Sec. 113. It would be more satisfactory if legislation had provided the method of division for sale by the tax collector of land assessed for taxes, inconsiderable in proportion to the value of the property. Still, we can not hold the constitutional requirement in this respect to be less stringent because of the absence of such legislation. In this case there were two distinct portions of property, each, too, susceptible of at least the division of setting apart the quantity apt to produce readily the sum required to discharge the small amount of unpaid taxes. We can not appreciate that any serious attempt was made to comply with the requirement of selling the least quantity. No specific quantity was offered. There is the statement in the deed that the entire property was the least quantity any one would purchase, and in the testimony that the collector first offered to sell a portion, and there being no bid he proceeded to sell the whole. This imports no compliance with his duty. That was to offer for adjudica-

tion a portion, so that the purchaser would know the extent and situation of the property proposed to be sold, and so that delivery could be made. Nothing of the kind was done or attempted.

The property was that of a succession, and it seems that the administrator and his attorney were present at the sale convened with the buyers; the attorney for the administrator testifies he understood the purchase was for the account of the succession, and it appears that the administrator offered to buy the tax title. All this it is claimed estops the succession from disputing that title. We do not find in any or all this conduct the basis for the alleged estoppel, least of all, that it was competent for the administrator or his attorney to surrender succession property by affirming a void tax sale. This view, too, disposes of the proposition advanced to support that title, that though present, neither pointed out any portion of the property to be sold. Their alleged omission, in this respect, did not authorize the sale attempted.

We have given attention to all the grounds urged in the brief and argument for plaintiff. What we have said disposes of the case.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be and it is hereby affirmed at plaintiffs' cost.

ON APPLICATION FOR REHEARING.

In dealing with the constitutional requirement that in tax sales the least quantity of the property shall be sold that any person will buy for the taxes, interest and costs, the decision is, of course, to be construed with regard to the facts in this case. The property included under one assessment was composed of distinct portions, the subject of separate descriptions spread on the public records and acquired by the tax debtor under different titles. In such a case the adjudication was in *globo* of the property assessed for over seven thousand dollars for the pittance of taxes due. It seems to us that the constitutional mandate as to the method of sale must be deemed applicable here, as we have applied it in our decision. Constitution, Art. 210.

Rehearing refused.

Railroad Co. vs. McNeely.

No. 11,790.

NEW ORLEANS, FORT JACKSON & GRAND ISLE RAILROAD VS.
MRS. ADA C. MCNEELY.

Effect of Remittitur on Appeal.—A remittitur by defendant of part of his claim in reconvention, after the verdict has been rendered, does not prejudice the appellant's right of appeal.

Filing of Transcript.—The transcript of appeal was filed within the delay allowed.

Jury's Valuation of Property.—Although the defendant does not interpose an answer, or file any claim for the value of property, a decree of expropriation must be preceded by and based upon a valuation of the property by the jury.

Verdict.—A jury's verdict is entitled to great weight in the expropriation proceedings, fixing the value of land sought to be expropriated, and will be annulled only when manifestly erroneous.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

James Wilkinson for Plaintiff, Appellant.

Thomas F. Maher for Defendant, Appellee.

Argued and submitted May 8, 1895.

Opinion handed down June 3, 1895.

Opinion refusing rehearing June 21, 1895.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

BREAUX, J. The plaintiff sues to expropriate a small triangular lot of ground situated in Algiers. Plaintiff tendered to the defendant the sum of fifty dollars for the lot, which the latter declined to accept.

The defendant denies plaintiff's allegation, and reconvened for damages and attorney's fees, which she fixes at more than three thousand dollars. The jury's verdict sustained the prayer to expropriate the land and assessed the value of the land expropriated at five hundred dollars. After the verdict the defendant abandoned his demands in reconvention for damages, and entered a *remittitur* of one dollar, thereby reducing the verdict to four hundred and ninety-nine dollars, and judgment was signed for the amount last stated.

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Railroad Co. vs. McNeely.

The defendant moves to dismiss the appeal on the ground that this court is without jurisdiction *ratione materiae*; on the grounds, further, that the transcript was not filed in time, and, lastly, that the plaintiff did not deposit the amount of the judgment with the sheriff.

With reference to the jurisdiction of this court, *ratione materiae*, it is settled that a remittitur after the verdict has no more effect on the rights of the appellant than a remittitur has after judgment in a case not tried by jury. It is governed by the same rule in so far as relates to appellant's right of appeal.

In Gayden vs. Railroad Company, 39 An. 269, 271, the court decided that a remittitur entered after the verdict did not prejudice the defendant's right to appeal, and cited several decisions in support of the court's conclusion.

RELATIVE TO THE FILING OF THE TRANSCRIPT.

The delays had not elapsed, and the plaintiff was within the required time when it was filed in this court on the 4th of April.

The order of appeal was granted on the 19th day of March. The plaintiff's transcript was filed within the three judicial days allowed by this court and the delay of fifteen days provided by a special statute. R. S. 1490; O. P. 589.

REGARDING A DEPOSIT OF THE AMOUNT OF THE JUDGMENT WITH THE SHERIFF.

The effect of the deposit by the corporation is to pass title from the owner to the corporation. It does not relate to the right of appeal. It remains unaffected by the deposit.

ON THE MERITS.

The defendant, having abandoned her reconventional demand, must be confined to the amount of the verdict and judgment of the District Court. She having formally entered an abandonment of all damages can not claim more than the amount allowed by the jury.

The plaintiff urges that the defendant having confined his pleadings to allegations of damages, and not having pleaded that the property sought to be expropriated was of greater value than the amount tendered, the jury was without power in law to give a verdict for a larger amount than that tendered, viz.: fifty dollars.

Railroad Co. vs. McNeely.

Under the statute the jury "shall, by a verdict in which at least three-fourths of their number shall concur, determine, after hearing the parties and the evidence, what is the value of the land." Sec. 1481, R. S.

The law's provision is that they shall fix the value of the land sought to be expropriated. Moreover, all of defendant's witnesses were heard under the plea of general denial regarding the value of the property, without any objection on the ground urged. There was a joinder of issue regarding the value of the land in question, but even if there had not been, on a confirmation of default, without claim on part of the defendant for its value, the jury would have to determine the value of the land. It is a prerequisite to a decree of expropriation.

This brings us to the question of the value of the property.

The learned judge was inclined to view the estimate of the jury as exaggerated. But he added in his reasons for overruling the motion for a new trial that the jury was exceptionally intelligent and a careful body of men; that they visited the premises at the request of both the plaintiff and the defendant.

He approved the verdict by the judgment.

The plaintiff invokes the fact that the property owned by the defendant was bought for much less than the appraisement of the value fixed by the witnesses for the defendant.

The last deed of purchase dates from several years prior to the suit for expropriation.

Several of the witnesses testified that the property has of late appreciated in value.

The plaintiff claims that by locating its track and by improving and draining its road, it reclaimed defendant's property and removed from it the dampness and seepage.

We infer that this betterment was not considered as a basis for a claim against the defendant, prior to the suit for expropriation.

The witnesses greatly differ in their estimates of the value of the property—i. e., the two lots and improvements.

It varies from twenty-eight hundred to less than five thousand dollars.

The witnesses for the plaintiff estimate it at much less. They fix the value of the lot, unimproved, at about four hundred dollars, and upon that basis of valuation the triangular lot expropriated would

be of very little value, as it is quite small as compared with the lot from which it was taken.

If the preponderance of the testimony regarding the value of this lot were with the plaintiff, the calculation of plaintiff's witnesses would not be an exclusive method of establishing value.

In estimating the value of a fractional part of a tract of land, the locality of the fractional part, the inconvenience it occasions to separate it from the main tract and the value it may have, without reference to the whole, may be considered.

"Where there is evidence to sustain the verdict and the testimony is conflicting, the court will not interfere; and especially is this the case where the jury have viewed the premises." Lewis on Eminent Domain, p. 824.

In addition to the testimony of witnesses—experts—as to value of the land; a lease made by the defendant to the plaintiff of the land sought to be expropriated, has some bearing upon the question.

The plaintiff, during three years, paid to the defendant fifty dollars *per annum* rent for the property.

It is explained that it was deemed preferable, as it was important to proceed without delay in laying the track, to enter into a lease with the defendant in 1891 than to incur the delay and expense of expropriating the property.

This explanation has great force; indeed, it is conclusive as to the first year of the lease.

But the plaintiff, in the contract of lease, reserved the right to cancel the lease at any time, and yet continued without attempting to exercise that right, to pay rental in an amount which proved that the property had considerable value.

The jury examined the property, after having heard the witnesses.

In expropriation proceedings juries have, in some respect, the character and authority of experts. Their verdict will not be annulled on appeal, unless manifestly erroneous. *New Orleans, Fort Jackson & Grand Isle Railroad Company vs. Eugene Rabasse*, 44 An. 178, 183.

Under the law and the evidence, the verdict and judgment appealed from seems to have done substantial justice.

Judgment for defendant, and affirming the judgment of the District Court, at appellants' costs.

Railroad Co. vs. McNeely.

ON APPLICATION FOR REHEARING.

The gravamen of plaintiff's complaints in the application for a rehearing are: That the court has not passed on the bill of exceptions taken by it to the judge's charge contained in the record and referred to in the original brief;

That the court and jury decided issues not presented by the pleadings, and *ultra petitem*;

That the decision is not accordant with a former decision, New Orleans, Fort Jackson & Grand Isle Railroad Company vs. Mrs. Elizabeth Barton, 43 An. 171;

That the amount allowed is too large.

The District Court refused to charge the jury that any damages suffered by the defendant could be offset by any improvements or advantages accruing to defendant by reason of the construction of plaintiffs on or near the property sought to be expropriated.

During the examination of the witnesses the plaintiff introduced evidence of a change made by it, in the location of a levee, of the drainage of property, and other improvements beneficial to defendant (it was alleged). The District Judge was not impressed by the evidence of drainage and improvements. He determined that whatever benefits were realized by the plaintiff were not chargeable to the defendant as an offset to the value of the property plaintiff sought to expropriate.

The issue was the "value of the land described in the petition with its improvements and what damages, if any, the owner would sustain in addition to the loss of land by expropriation." Sec. 1481 R. S. The theory and conclusion of our original opinion were that the District Judge did not err in confining the issue under the terms of the statute and in refusing to give the instructions requested.

WITH REFERENCE TO THE DECISION BEING ULTRA THE ISSUES OF THE CASE.

The facts are that although the defendant after the verdict discontinued her demand for damages in order to defeat plaintiff's right of appeal; the jury had not allowed any damages, as will be seen by the verdict.

"We fix the value of the land expropriated at \$500."

The defendant abandoned a claim rejected by the jury, also one dollar on the value of the land expropriated.

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The question of the value of the land remained an issue.

The defendant was not committed by an admission as to the value.

There was a defence interposed.

Even without a defence on the confirmation of a default in expropriation proceedings it would have been the jury's function to assess the correct value of the land.

RELATIVE TO THE DECISION IN THE BARTON CASE CITED AND COMMENTED UPON, AND TO THE AMOUNT OF THE VERDICT.

The facts are not absolutely the same in the case cited and the case here.

It was in proof that the land in controversy in the Barton case was part of the batture and subject to overflow every year.

In the case here there is no such damaging proof.

We thought and still think that the jury, commended by the District Judge as "exceptionally intelligent and a careful body of men," who had visited the premises in question "at the request of both parties," had correctly fixed the value of the land.

The verdict of the jury was unanimous.

In *Telegraphic Cable Co. vs. Railway Co.*, 43 An. 522 and 523, this court said:

"It has long been held in this State that the jury of freeholders, authorized by our laws to act in expropriation proceedings, have, to some extent, the character and authority of experts supposed to have some personal knowledge of the matters submitted to them, and authorized to rely in their opinions as well as on the testimony adduced before them. Their verdicts are, indeed, subject to review by appeal, and may be amended when manifestly inadequate or excessive, but they are entitled to great respect, and will not be interfered with, except in cases of gross or manifest error." Citing *Carrollton Railroad vs. Avart*, 11 La. 190; *Remy vs. Municipality*, 12 An. 500.

Here, as in that case, the award has no feature "of gross and manifest excess."

No. 11,767.

WIDOW AND HEIRS OF FLORE NICOLAS BRIGOT VS. AUGUSTINE
EULALIE ISABELLE BRIGOT, WIDOW OF D. F. SISOS.

The appeal was from a judgment maintaining the plea of *res judicata*.

The attack made by the plaintiff on the judgment was collateral.

The proceedings and the judgment were apparently regular before a court of competent jurisdiction.

It was in proof that a third person, who was an intervenor, had acquired an interest.

The judgment could not be considered absolutely void.

In so far as it may be voidable, the action to annul it must be direct.

Without sustaining the plea of *res judicata* the judgment dismissing plaintiffs' action is maintained as in case of non-suit.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

G. V. Soniat for Plaintiffs, Appellants.

Charles Payne Fenner, Curator ad hoc, for Defendant and Appellee.

Charles F. Claiborne for Intervenors, also Appellees.

Argued and submitted June 5, 1895.

Opinion handed down June 17, 1895.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs are Petronille Daulin, widow of Flore Nicolas Brigot, Eugenie Marguerite Godeberte Brigot and Maurice Albert Brigot.

The husband of the first named plaintiff was the only issue of the marriage in 1813 of Nicolas Augustin Brigot and Adele Martin Godeberte.

He abandoned his wife in France and came to New Orleans.

He married here on September 12, 1816, Anne Meullanotte, during the existence of his wife, Adele Godeberte, (who died in 1832.)

He acquired property and returned to France, where he died testate on the 27th December, 1847, leaving all his estate to Anne Meullanotte, and disregarding entirely his son, Flore Nicolas Brigot,

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to whom he did not leave anything by his will. An act of compromise was effected in France between this son and Anne Meullanotte in 1848.

Under the terms and conditions of this compromise the latter went into possession, as owner of a property No. 133 Royal street, of this city, and the former, Flore Nicolas Brigot, became the usufructuary of two other properties, 131 and 135 same street, and two natural daughters of Flore Nicolas Brigot, viz.: the late Adelaide Marie Brigot and Augustine Eulalie Isabelle Brigot, widow by Dominique Felix Sisos, the defendant here, became the owners of the property of which he, F. N. Brigot, had the usufruct.

Flore Nicolas Brigot married Petronille Daulin, one of the plaintiffs and appellants. It was stipulated in their contract of marriage that the survivor should inherit all the property of the predeceased party contracting.

The issue of this marriage were Eugenie Marguerite Godeberte Brigot and Maurice Albert Brigot, and appellants here.

Flore Nicolas Brigot died in 1870. His widow was appointed administratrix of the succession in France, but never qualified in Louisiana. Mrs. D. F. Sisos and her sister, Adelaide Brigot, who died since, and from whom the former inherited as universal legatee, claimed the two properties in Louisiana, which they alleged was theirs in absolute right, since the death of their father the usufructuary.

Mrs. Petronille Daulin, Widow F. N. Brigot, brought an action in France against Mrs. D. F. Sisos and her sister Adelaide. She contended that the act of compromise in 1848 was void; that these defendants were the adulteress children of Flore Nicolas Brigot; that legitimate children were born since the date of the donation; that Anne Muellanotte was an interposed person, and that the testator could not, under the law, dispose of the ownership of the property and at the same time retain the usufruct.

In this suit the act of compromise of 1848 was declared null and void by a judgment of the court of first instance, which was subsequently affirmed by the court of appeals. There were other proceedings in the court of France, at dates subsequent, all tending to affirm the correctness of the first judgment.

In 1893 the plaintiffs brought suit here for a recognition of their

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alleged rights under their judgment rendered in France, and fixing, it is urged, the *status* of all parties concerned.

This would involve a confirmation of all the proceedings of the foreign tribunals regarding the rights of the parties, and would necessitate, were plaintiffs' prayer granted, the rendering of a judgment decreeing that the plaintiffs are the owners of the property in the same proportions as was decreed by the courts of France; a partition would have to be ordered and the defendants condemned to account for rents.

The defendant was cited through a curator *ad hoc*. He pleaded: No cause of action.

Res judicata.

The last ground is based upon a judgment rendered in 1876 (in a suit brought in 1872). The suit was brought, in the first place, against C. Guillet, a person in possession.

In 1873 the late Fergus Fuselier, a regular practitioner at this bar, filed an answer as counsel for Widow Flore Nicolas Brigot (plaintiff in the case before us), as owner of half of the community and usufructuary of the remainder, also as tutrix of Eugenie Marguerite Godeberte and Maurice Albert, issue of her marriage with Flore Nicolas Brigot.

The petition and answer in this suit presented issues for decision similar to those argued and decided in the courts of France in the cases to which we have before referred.

Different views were entertained by the courts of Louisiana from those held by the courts of France.

We have substantially given account of the conclusion reached in the courts of the latter country (France). In the courts of the former, the plaintiffs in the suit, the defendants here, were recognized as the owners of the lots here in question. The decision was pronounced by Judge Lynch, of the District Court. The parties cast did not prosecute an appeal.

It follows as a conclusion that by thus recognizing the title as vested in them, validity was given to the act of compromise in question.

The plaintiffs deny that the judgment pleaded as *res judicata* is of any validity, and seek to have it treated as an absolute nullity on the ground that one Guillet, who had been cited, but who had no authority to stand in judgment, answered, disclaiming title.

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Subsequently Cavaroc & Son were cited as agents, who presumably employed the attorney who appeared for the defendants, but of this there is no evidence of record.

The attorney, however, as we have before stated, appeared for the defendants, and not in the name of their agents. They allege here that the agent and the attorney were not authorized to represent the defendants in that suit, and that, if he was authorized, the attorney discontinued the reconventional demand.

To sustain their defence against the plea of *res judicata*, the plaintiffs offered the affidavit, duly authenticated, of Widow Brigot (*née* Daulin), declaring that she had not authorized Fuselier, attorney, to represent her, as defendant. The court ruled that the affidavit was *ex parte* and inadmissible. Creditors of the defendant, Lamarque & Co., intervened in the case now before us for our decision, and alleged that they were in possession under an antichresis granted by defendant in 1879. They also pleaded *res judicata*.

The District Court sustained that plea and dismissed plaintiffs' suit.

From the judgment the plaintiffs prosecute this appeal.

Without direct proceedings to set aside the judgment plaintiffs were without right to question its validity. There is not an allegation in plaintiffs' suit assailing the validity and binding effect of the judgment.

Plaintiffs remained silent during many years; the estrangement between them and the title they now claim was complete. The judgment rendered contradictorily with counsel is not absolutely void.

Voidable judgments are binding until reversed by some direct proceeding. "This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine which is founded upon reason and the soundest principle of public policy." Black on Judgments, p. 245.

The mere affirmation of a reputable attorney that he is the retained counsel in a cause has the sanctity of an oath. They, the attorneys at law, are the officers of the court, whose principal duty is to be true to the court and their client.

The record and the allegations of counsel import absolute verity as respects the authority to represent their clients.

This being the case the judgment must be presumed to have been

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regularly obtained until the contrary is shown in direct proceedings. A collateral attack is defined as an attempt to impeach the decree in a proceeding not instituted for the express purpose of annulling it. There was no allegation made by plaintiffs to impeach the proceedings in the case here.

If, for the purpose of a practical test, we were to suppose that the defendant had sold the property at the time the suit was brought to an innocent third person.

If the right to impeach defendant's judgment collaterally were maintained, it would be possible, in the course of the trial, to introduce an *ex parte* affidavit, and thereby invalidate the judgment, the basis of the title.

The possibility of thus setting aside a solemn judicial declaration would, in certain instances, render the title to property quite unsafe. The property has not been sold, but creditors of the defendant have intervened. They have an antichresis under which they went into possession and collected the rents. They urge that any judgment against the defendant would impair their security.

The denial of the validity of the judgment and the tacit joinder of issue, arising without replication, do not offer opportunity to a defendant in exception to impeach a judgment collaterally in matter relative to evidence.

Whether it be regular or irregular, correct or erroneous, valid or invalid, it is not subject to collateral attack. Black on Judgments, Vol. 1, p. 246.

The ground urged by plaintiffs that replication is not permitted, we do not think would justify us, if we were to disregard a rule "founded upon reason and the soundest principles of public policy." Black on Judgments, p. 245.

The presumption of negation by defendant in rule, in exception or reconventional demand, does not have the effect of changing the rule in question.

The *ex parte* affidavit in support of the assertions made at the time when it was offered in evidence that the attorney was not authorized, was not even the commencement of proof. It had none of the characteristics of proceedings taken contradictorily with parties in interest. It was only a sworn declaration offered without pleading or allegation of any kind. In the cases cited the evidence must have had some of the features of contradictory proceedings. The

Heirs of Brigot vs. Brigot, Widow.

affidavits against the acts of attorneys, as not having been authorized, were in support of issues directly presented.

The judgment pleaded as *res judicata* is not, as urged by plaintiffs' *res inter alios acta*.

The suit in which it was rendered was brought by the defendant against the plaintiffs for the property involved. The defendant (here plaintiff) in the first suit in which they obtained recognition of their title sued as heirs of Flore N. Brigot, the alleged author of their title, and presented issues contradictorily with plaintiffs here and defendants in 1876, when the judgment in question was obtained similar to those now raised.

The dismissal of the reconventional demand (in the first suit prior to 1876) did not include the whole answer, and was not as far-reaching in its effects, as an abandonment, as is now contended by the plaintiffs.

Two motions in the case in question, No. 10,009 of the Superior District Court, had been made by plaintiff's counsel to strike out the reconventional demand.

Granted, that it resulted in a discontinuance of the reconventional demand, as urged by the plaintiffs, the fact remains that the answer, less that demand, was before the court, and that the attorney continued his defence of the case, and contradictorily with him a judgment was pronounced.

This is concluded upon the hypothesis, which must govern for the time being, that the attorney was duly authorized to represent the plaintiff.

The plaintiff, in addition, objected to the intervention filed on a number of grounds.

We will not consider them separately and in detail.

The petition of intervention was not as formal as it might have been. The grounds were set forth with sufficient particularity to enable the intervenors to prove their interest under their antichresis, and join the defendant in urging the plea of *res judicata*.

Counsel, in his brief, clearly and cleverly arguing the different phases of his cause, refers to the range, in a geographical point of view, of the litigation, and to the hearing given to it before judicial tribunals in two continents.

He urges that the decisions of the courts of the domicile of the respective parties in France should govern. Estoppel is pleaded, and

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the comity due to the decisions of a foreign tribunal. These questions can not be determined in proceedings seeking collaterally to impeach a judgment which can not be utterly ignored.

We do not pass upon the plea of *res judicata*. We hold that the judgment can not be collaterally impeached.

It is ordered, adjudged and decreed that the judgment appealed from is affirmed, at appellees' costs, in so far as it is a judgment of non-suit; and it is annulled and reversed in so far as it rejects plaintiffs' demand.

NICHOLLS, C. J., absent.

No. 11,840.

THE PARISH BOARD OF SCHOOL DIRECTORS VS. THE CITY OF SHREVE-
PORT.

The amounts placed on the budget for the annual expenses of a municipal corporation, when collected by the taxes levied for such expenses, must be applied to the purposes specified in the budget, and the corporation will be liable for any diversion of such amounts. 36 An. 636.

Funds raised by taxation for such purposes are trust funds, and the prescription of one year will not protect the corporation from liability for the taxes thus collected.

A PPEAL from the First Judicial District Court for the Parish of Caddo. *Taylor, J.*

T. C. Barrett, F. G. Thatcher and Albert H. Leonard for Plaintiffs, Appellees.

M. S. Jones, City Attorney (Wise & Herndon, of Counsel), for Defendant, Appellant.

Argued and submitted June 8, 1895.

Opinion handed down June 17, 1895.

Rehearing refused June 27, 1895.

The opinion of the court was delivered by

MILLER, J. The plaintiff sues for the amount claimed to be due by defendant under the provision for the support of public schools

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made on the annual budgets of the city of Shreveport for the years from 1881 to 1891, and alleged to have been collected. The defence is, the city was under no obligation to levy any taxes for schools, hence is not bound for the amounts budgeted, and prescription is also pleaded.

This controversy was before this court previously on the exception of no cause of action. On the issue then presented of the liability of a political corporation to the school board for the taxes collected for school purposes, and not paid over to the board or expended for such purposes, our conclusion was the liability existed. In the view of this court the liability arose from the fact that the taxes had been collected for the budget purposes; whether with or without express law directing taxes for schools was unimportant. We held after including in the annual budgets these school items of expenditure to be provided for by the taxes to be levied, and actually collecting from the taxpayer the taxes sufficient to defray the budgeted items, the City could not escape liability for the amounts thus collected by it for the schools. Parish Board of School Directors vs. City of Shreveport, 47 An. 21. Affirming the legal proposition presented, the city was left to any other defences it might have, but the case, save in respect to the budget provision of the years claimed to have been paid, and the defence that the amounts appropriated were only for school rents, the case is now before us on testimony not varying essentially from the allegations in the petition. Our previous decision controls the determination of this controversy, except to the extent of the modification supported by the testimony.

The provision on the budgets for each year were "for schools," "for school account," "for school house account," "for school house" except for the years 1889 to 1891, when the appropriations were varied in form to school rents. There is testimony, and it is insisted in argument, the City Council intended to provide only for the rents of school houses. We think the fair import of the terms used in the budgets must be accepted as indicating the purposes intended. As we appreciate the testimony the rents for the years 1889, 1890 and 1891, exceeded the budgeted amounts. For the other years in which the provision, in varied forms, was for school expenses, it is not disputed the amounts were required for the schools. There is no controversy as to the collection of the taxes for these

purposes, nor is it denied that the city has not paid these amounts in full, but there remains unpaid the sums claimed in the petition.

We have given attention to the argument there is no obligation on the part of the city to the plaintiff, because there was no law to authorize the levy of a school tax. The law in authorizing a tax of ten mills for all purposes of city expenditure leaves these purposes to the discretion of the City Council. It is required that these purposes shall be stated in the budget, which, made up of all anticipated municipal expenditures, serves as the measure and as the warrant of the taxes to be collected from the taxpayers. In our view, the amounts collected by taxes for any of the purposes stated in the budget, is to be deemed levied under the law, quite as effectively as if the taxation for that purpose was directed by a specific statute. The obligation of the city to pay the amount collected by taxes for the purpose stated in its budget arises, in our opinion, from the fact that the city has collected the amount from the taxpayers. We have here in New Orleans the same system as in Shreveport, of annual budgets for the estimated subjects of municipal expenditure, and the budget is the measure of the tax to be imposed. True, the law directs New Orleans to include a certain amount for school purposes. In Shreveport the inclusion of such amount in the budget is left to the discretion of the council. Whether the provision is required or left discretionary is, in our view, immaterial. If the provision is made and the requisite amount is collected the resulting obligation is to pay the amount to those entitled to the provision. The courts have recognized this obligation on the part of this city, and the same conditions apply to Shreveport. See Act 58 of 1879; Act 1882, No. 20, the City Charter, Sec. 64; Act No. 109 of 1882, amending Act No. 20 of 1882; *Shotwell vs. New Orleans*, 36 An. 938.

The amount collected by taxation for a specific purpose is a trust fund. The application of the fund for that purpose is usually enforced by *mandamus*. We can not see the application of prescription to protect the municipal corporation from liability for the funds thus collected and withheld. We are clear the prescription of one year can not be sustained. We note, too, the contention that taxes can not be seized; all recognize that immunity, but the exception has no force to shield the city from a money judgment. That is all that is claimed in this suit—not its enforcement by seizure or in any mode. 2 Dillon on Municipal Corporations, Sec. 849 *et seq.*;

School Directors vs. City.

Maenhaut vs. New Orleans, 2 Wood's Rep. 108. As we understand the testimony the amounts in the budgets for 1884, 1886 and 1891 have been paid. The city should not be charged with any amount for these years and in this respect the judgment should be amended.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be amended so as not to charge the city with the amounts in controversy or any part thereof in the budgets of 1884, 1886 and 1891, and as thus amended it is affirmed, the costs of appeal to be paid by plaintiff.

NICHOLLS, C. J., absent.

ON APPLICATION FOR A REHEARING.

MCENERY, J. In the application for a rehearing in this case it is stated that decree is in conflict with and overrules the cases reported in the 40th Annual, p. 755, entitled *The State ex rel. Parish Board of School Directors vs. Police Jury*, and 42d Annual, p. 92, entitled *The State ex rel. Board of Directors of Public Schools of New Orleans vs. City of New Orleans*.

It is stated in the opinion that it was discretionary with the Council of Shreveport to levy the tax. Our meaning is that the city of Shreveport voluntarily collected the tax for school purposes. No town or city in the State has even a discretion to exercise the taxing power in behalf of public education; that is, the discretion is not such as when exercised it is binding on the taxpayer.

The taxpayer, having voluntarily submitted to a tax for school purposes, and having paid the same and placed it in the city treasury for such purpose, it becomes a trust fund, and the City Council was without power to use it for any other purpose. It would be as illegal and wrongful to use it for other purposes of city government as to thus divert any other fund, lawfully imposed and collected, specially devoted by the taxpayer for certain purposes.

Our decree merely announces that, whether lawful or not, the tax was voluntarily paid to be used in aid of the public schools, and could be used for no other purposes. That it was not called for does not prevent its use at a future time. If the taxpayers intended to use the assessment rolls as a means of a just imposition of the burden among them, the amounts unused should have remained in the

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city treasury for future use, and thus lighten the voluntary contribution which in succeeding years the taxpayers might impose upon themselves.

No. 11,773.

THE BROOKLYN COOPERAGE COMPANY VS. THE CITY OF NEW
ORLEANS ET AL.

The importer of shooks or staves, already bent, so as to form a barrel; of barrel heads ready for insertion, and of hoops to be driven, is not to be deemed a manufacturer of a barrel merely because he substitutes machinery for the usual hand labor of setting up the staves in barrel shape, introducing the prepared headings, and driving on the hoops, first subjecting the staves and other material to a heating process, and the machinery and property thus employed is not exempt from taxation under Art. 207 of the Constitution.

The exemption sought in this case distinguished from the exemptions recognized of manufacturers of articles of wood from raw materials. *Martin vs. New Orleans*, 38 An. 397; *Carre vs. New Orleans*, 41 An. 998, and similar cases.

A PPEAL from the Civil District Court for the Parish of Orleans.
Theard, J.

Thomas J. Semmes for Plaintiff, Appellee.

E. A. O'Sullivan, City Attorney, and *Henry Renshaw*, Assistant City Attorney, for Defendants, Appellants.

Argued and submitted April 24, 1895.

Opinion handed down May 6, 1895.

Rehearing refused June 27, 1895.

The opinion of the court was delivered by

MILLER, J. The plaintiffs enjoin the collection of city and State taxes assessed on the buildings and machinery alleged to be employed by the plaintiff in the manufacture of barrels, kegs and hogsheads of wood, exempt from taxation under Art. 207 of the Constitution. The exemption claimed is denied by the defendants, and they appeal from the judgment of the lower court maintaining the injunction.

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48	527
48	873
49	328

47	131
119	64

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The testimony is the plaintiffs import from the North and West, prepared material for the making of barrels. This material consists of the staves or sides, hoops and headings. The stave is dressed, jointed, and, as one of the witnesses expresses it, ready for use. The hoops also come prepared, as do the headings. The manufacture of these prepared staves and headings, on which the plaintiffs rely, consists in drying the material, setting them up in barrel forms done by hand; then a machine is used to make the shape of the barrel, followed by a heating process, and the hoops are driven on by a trussing machine, it is testified, to form more completely the barrel's shape. After this, the barrel passes to a machine which "gets" the croze and chimes ready, and finally the "hoopers off" shape up the barrel and turn it into the warehouse. The machinery used for these purposes serves for the hand labor usually performed, and doubtless is quicker. Turning from the processes indicated in the testimony for plaintiffs, other witnesses testifying to the work on this material state: the staves, heads and hoops are imported, the barrel raised or set up, then wound up, fired, "machinery works it off at the ends, puts the croze on, the cooper then sets the hoops on and finishes the barrel;" machinery, the witness adds, is used in working the barrels off at the ends. The barrels thus made are for sugar and rice, and constitute the business of plaintiffs conducted at their establishment.

The exemption of the Constitution is of machinery, capital and property employed in the manufacture of furniture and other articles of wood. The case raises the question whether processes of the kind depicted in the testimony, which put into shape the parts of a barrel ready to set up, from staves, heads and hoops, already cut, shaped and prepared, is to be deemed the manufacture of articles of wood in the sense of the Constitution. Undoubtedly the plaintiffs' machinery serves the purpose of setting up the prepared staves already bent for the purpose, inserting the heads, and putting on the hoops that come with the staves. But the component parts of the barrel are supplied and at hand, and whether the barrel is set up by manual labor or machinery, the processes can not, we think, be considered as the manufacture of an article of wood in any ordinary or legal sense of the word. The heating of the prepared staves, the putting on the prepared head, the driving of the hoops, are all necessary to the completion of the barrel, but not one nor all these processes constitute, in any ordinary significance, the

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manufacture of the article, nor does the additional fact that the barrel is held by machinery to receive the head, or hoops, or the heading, furnish, in our view, any better support to the claim that the plaintiff is a manufacturer.

It is familiar that exemptions from taxation are strictly construed. Our courts have held that doors, sashes and blinds manufactured from the raw material are exempt from taxation. *Carre vs. City*, 41 An. 996; *Martin vs. New Orleans*, 38 An. 398. So a cooper who makes barrels and hogsheads from rough logs and splits was held exempt, but that was the case of a license tax from which he was exempted as following a mechanical occupation. Const., Art. 206; *City vs. LeBlanc*, 34 An. 596. Again we held the exemptions applied to "shooks" manufactured from the rough timber. We find no warrant to increase these exemptions based on the processes performed by plaintiffs upon the staves, hoops and headings already adapted to be shaped into the barrel by ordinary hand labor for which plaintiffs substitute machinery.

We understand from the record that no hogsheads were made in the plaintiffs' establishment, and hence no exemption in that respect is before us. Nor is it urged that plaintiffs claim exemption for any business other than that we have discussed. The assessment on lots, buildings, machinery is that called in question on the ground of the asserted exemption.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and that plaintiffs' injunction be dismissed at their costs.

No. 11,616.

JAMES A. KOEHL ET ALS. VS. OTTO H. SCHOENHAUSEN.

State and city business licenses furnish no defence against a suit to abate nuisances arising from the unauthorized uses made of the licenses. *Wood on Nuisances*, Secs. 743, 746, 751.

The uses of such licenses that congregate crowds of disreputable people; lead to drunkenness, debauchery, noises and midnight arrests, preventing sleep, and presents to the view of neighbors and to the public lewd women, indecently attired and lascivious behavior of men and women, create nuisances of the most serious character, affecting the residents of the neighborhood. *Wood on Nuisances*, Secs. 1, 15, 38, 39, 542, 801.

Koehl et als. vs. Schoenhausen.

Such nuisances disturbing individuals in the enjoyment of their property, injurious to their rights and interfering with their peace and comfort, may be abated at the suit of the parties affected, although the nuisances prohibited by law and the ordinance are within the police power to suppress. Wood on Nuisances, Secs. 541, 542, 618, 507; 86 An. 162.

The writ of injunction in such cases, prohibiting the evils complained of, is authorized to be enforced by the penalty for disobedience imposed on the defendant, whenever and as often as the nuisances are produced arising from the unauthorized uses he chooses to make of his licenses. Wood on Nuisances, Secs. 619, 621, 645, 647; Code of Practice, Arts. 296, 308; Schoenhausen Applying for *Certiorari*, 47 An. *Ante*, 696.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Lazarus, Moore & Luce and Charles P. Drolla for Plaintiff, Appellee, cite: Wood on Nuisances, Secs. 1, 2, 16, 25, 29, 37 to 68, 662, 693; 36 An. 162; 108 U. S. 331.

Thomas M. Gill for Defendant, Appellant, cites: 45 An. 1488; 31 An. 647; 28 An. 130; 38 An. 555; 44 An. 645; 33 An. 1013; 39 An. 1000.

Argued and submitted March 28, 1895.

Opinion handed down May 6, 1895.

Rehearing refused June 3, 1895.

The opinion of the court was delivered by

MILLER, J. The defendant appeals from the judgment of the lower court, making perpetual the injunction prohibiting him from conducting the concert saloon at the corner of Customhouse and Royal streets, and decreeing the establishment to be a nuisance.

The petition was filed by property holders, averring substantially that the female employees of the defendant dressed immodestly, enticed the men frequenting the establishment to drink with them, leading to indecent familiarities; that the establishment opened in the evening, remained open at night, devoted to drinking and debauchery of the women and men; that these excesses led to disorderly conduct, frequent arrests at night, occasioning unpleasant scenes at the entrance of the place and on the street, annoying to the residents and interrupting their sleep; that the fascinations of

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the establishments attracted vicious and disreputable people; that the theatrical performances there were indecent and could be seen from the street; that the women, with their lewd style of dressing, exhibited themselves so as to be seen from the premises of petitioners, or of some of them, were forced on their attention, and the petition contains other allegations tending to show that the place, the business conducted and the attendants constitutes a nuisance to the neighborhood.

On two of the corners where the establishment is located are new hotels erected at great expense, adapted for the accommodation of large numbers of guests and receiving a fair share of public patronage; on another corner is one of the principal family grocery stores of the city; a short distance from this concert hall are furniture stores and other business establishments.

We have a record in this case of over six hundred pages. The testimony comes from residents, guests at the hotels, the hotel proprietors, the business people in the neighborhood, police officers and others. Here and there we find the statement that there are other disreputable places of the same character; from some of the police we have the subdued, but none the less significant expression that the place is a concert saloon, and that which takes place there is that pertains to a place of that character. Again we have the defensive testimony that the women employees have visited the hotels, and that goods have been bought in the neighborhood for the establishment. We take occasion to say that this testimony to our minds carries no significance of the slightest tolerance of the establishment on the part of those indicated by the testimony and against whom it was directed. The hotels appear to be well conducted and highly reputable, and it is supposed that disreputable people may, perhaps, find entrance occasionally in any hotel without affecting the character of the house. As to the supplies said to be purchased for the establishment, there is in the record testimony that one of the business houses in the neighborhood refused to have any account with the establishment. It is in the record, too, that some of the neighbors consented to the location of this establishment. That was before the business was developed. We notice this species of testimony only, because it is in the record, not that we deem it of pertinence in determining the controversy. If in that neighborhood there are similar places, it is equally true the street is a principal thoroughfare

for the public, on the way to a large hotel, business houses, the courts and churches. The supposed tolerance attributed to some of the neighbors is not supported; if it were, it would be of little moment in the solution of the issue here. The other aspect of the testimony has had our careful attention. We do not propose to recapitulate it. We announce the conclusion it supports the allegations of the petition, both as to that which takes place within the premises, and as to that having more direct relation to the question before us—*i. e.*, the public aspect of this licensed business. The appearance of disreputable women in the public approaches to the place; their character manifested by their conduct and dress; the assembling of bad characters about the building; the noises incident to drunkenness and boisterous enjoyment disturbing the peace and quiet of the neighborhood; the midnight arrests of disorderly women and men breaking the stillness of the period for sleep; the exhibitions of women in scant attire and the indecent familiarities forced on the observation of neighbors, and notwithstanding screens at the doors, still exposed to some extent, at least, to the public attention, all these and other externals of this place we consider established.

The defence is substantially that the Revenue Act No. 150 of 1890, Sec. 10, Class 2, authorizes licenses of concert halls, where can-can, clodoche and similar female dancing are shown, and that defendant holds such licenses.

In our opinion there can be no question the uses by defendant of his licenses causes nuisances of the most serious character. Those uses collect disorderly crowds; lead to boisterous conduct; noises and midnight arrests, disturbing the peace; presents to the public view lewd women, indecently attired, and lascivious conduct, all instances of nuisance given in text-books and adjudicated cases. To mitigate the character of defendant's business we find in the record testimony from witnesses who undertake to say the value of property in the neighborhood is improved by concert saloons, with all the methods belonging to them, brought to our notice. The erection of hotels and expensive business stores in the view of these witnesses, whose opinions are put before us, are not causes of improvement of property. We reject this testimony that concert saloons of the character in question here are aids in tending to increase values. We reach the other conclusion, indicated by other testimony, that such establishments menace values. The deprecia-

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tion of the property of others arising from the use one makes of his own, is another element of nuisance. In every point of view, it is our conclusion, defendant's establishments fall within the classification of nuisances in legal as well as in ordinary significance. See *Wood on Nuisances*, Secs. 1, 15, 72, 38, 39, 52, 542, 801.

It is urged, if a nuisance it is licensed, hence is beyond interference by the courts. The answer to this contention is that the business carried on is plainly not covered by the licenses. Concert saloons do not imply, least of all express, in the faintest sense, the uses of this establishment; nor do clodoche, cancan or similar female dances, to use the words of the statute, whatever the significance of clodoche and the cancan, include the conduct and manifestations in defendant's premises and other attendants of the uses of his licenses. The public scandal, against which this suit is directed, does not arise from female dancing permitted by the licenses. The record points to other and different causes of the complaints in the petition. It may be added that when licenses are invoked to protect evils of the character under consideration here the licenses are not to be strained. We think it is entirely safe to conclude they have no tendency to authorize the uses the defendant claims to be within the scope of the statute. *Wood on Nuisances*, Secs. 38, 39, 753, 742, 756 and 751.

Nor do we think there is any force in the contention that because of the licenses defendant holds, the citizen has no action to abate the nuisance claimed to be protected by the license. There is in this the intervention of the Attorney General joining the petitioners. Without it we think the right of action of the petitioners is complete. *Wood on Nuisances*, 619, 625, 645, 647, 653, 655; *Blanc vs. Murray*, 36 An. 162.

The judgment of the lower court enjoins defendant from conducting the business of a concert saloon. But his licenses authorize that business. As long as that legislation is on the statute books, it is obligatory on the courts. The statute supposes the concert saloon business to be reputable. It is the legislative judgment courts can not question. It is by perversion from the business of concert saloons, authorized by the statute, that they become disreputable. In other words, it is the uses of defendant's premises that creates the nuisances. The prevention of those uses is within the judicial control. We take occasion to say they are equally within the con-

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trol of the police authorities. We will have to reverse the judgment, but we affirm the entire power of the courts to restrain, with the full vigor, and to the utmost extent of the law, all violations of public decency and of order, attempted under the cover of licenses extending no shadow of such immunity as is claimed for defendant in this case. If the gross improprieties within the defendant's premises are stopped, and they are within his control, there will be, we think, no gathering of disreputable people or noises, or midnight arrests, disturbing the peace of the neighborhood, nor indecent exhibitions forced upon the public attention. The court, in determining the question of nuisance, directs its inquiry to the inconveniences, annoyances and scandals that affect the defendant's neighbors and the public using the street. The remedy administered must, necessarily, be applied to the causes that bring about the evils of which the petition complains, and these causes are in the methods permitted by defendant within his premises. The judicial prohibition is of those methods; will confine the defendant's business to that described in his license, and will not tolerate its abuse and perversion to purposes not within its scope. We think the lower court will have no difficulty in enforcing, if the occasion arises, the observance of its injunction, so as to prevent acts within or without the building, tending to violations of peace and decency.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, that the preliminary injunction be made perpetual, restraining the defendant from conducting in any manner not within the scope of his license and tending to disturb the peace or produce scandals in the neighborhood, or prohibited by the ordinances and laws, and that plaintiff pay costs.

ON APPLICATION FOR REHEARING.

In this case the decree is amended, so as to direct the costs of the appeal to be paid by plaintiffs, and with this amendment, the rehearing is refused.

No. 11,794.

W. L. MCNEELY, TUTRIX, vs. J. H. MCNEELY, EXECUTOR, ET AL.

The husband is presumed to be the father of the child born of the wife during the marriage, and as separation from bed and board does not dissolve the marriage, it follows that the child, to which the mother not divorced gives birth

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after the separation, is within this presumption of paternity the law fixes on the husband; as one of the leading commentators puts it: "Comme la separation du corps ne dissout pas le mariage, il suit de la, que la presumption de paternite etablie par l'article 312 subsiste encore." Civil Code, Arts. 184-185, 189-186; Code Napoleon, Arts. 312, 306, 310; 1 Duranton, p. 366, par. 632: Le jugement de separation de corps laisse qui subsister le mariage ne peut faire cessa la presumption de paternite de l'enfant concu depuis la separation. 2 Toullier, p. 124, par. 311; 2 Boilleux, commenting on Art. 313, C. N., p. 72.

This presumption of the paternity of the child of the wife, born since the separation from bed and board, is not conclusive; the husband is permitted to dispute it by suit; but if the paternity of the child is not thus disavowed by the husband or his heir, the presumption that the husband is the father becomes absolute, and the legitimacy of the child placed beyond question. Civil Code, Arts. 188, 191; Napoleon Code, Art. 313, as amended by the law of 1850, Art. 318; 1 Dalloz, Code Annote, Art. 313; 2 Boilleux, 79, 73; 3 Laurent, p. 480, par. 376; 2 Marcade, commenting on Art. 318, as to form action on desaveu; 2 Boilleux, 87, 88; 1 Rob. 585; 44 An. 441.

The Code, in declaring the legitimacy of the child, born three hundred days after the separation from bed and board, may be contested by the husband, defines the extreme duration recognized by law of the period of gestation which, with certain exceptions, must elapse to permit of the dispute by the husband of the legitimacy of the child, but the period beyond the three hundred days to the birth of the child of the mother separated from bed and board, not divorced, is unimportant on the question of legitimacy; the requirement of the law on that issue is that the husband, or his heir, shall disavow the paternity of such child by suit, and maintain the disavowal by proof. Civil Code, Arts. 188, 191, and authorities cited above.

A PPEAL from the Fourth Judicial District Court for the Parish of Grant. *Weaver, J.*

White & Thornton and R. J. Bowman for Plaintiff, Appellant, cite: C. C. 143; 11 An. 657, 853; C. C. 210; 44 An. 433, 441; 12 An. 853; 1 R. 581.

W. C. Roberts and R. E. Milling for Defendants, Appellees, cite: C. C. 186, 187; 30 An. 1300; 44 An. 441.

Argued and submitted June 6, 1895.

Opinion handed down June 17, 1895.

Rehearing refused June 29, 1895.

The opinion of the court was delivered by

MILLER, J. The plaintiff, the mother and tutrix of Ross McNeely, alleged to be the child of Ludlow McNeely, deceased, sues for the

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recognition of the child as the sole heir of the deceased, and to have annulled his last will, by which he constituted as universal legatee his brother, J. H. McNeely, the defendant. The will is assailed as not conforming to the legal requisites of nuncupative testaments under private signature. The defence is substantially that the will is valid, and a denial of the alleged paternity of the child. From an adverse judgment plaintiff appeals.

The deceased was separated from bed and board from his wife on the 23d May, 1889. The child, on whose behalf this suit is brought, was born on the 10th April, 1890. The deceased, by his last will, bequeathed all his property to his brother, and died on the 29th April, 1893. The paternity of the child was never disavowed by the deceased, and the question is whether the legitimacy of the child can be disputed by the universal legatee.

The Code declares that without proof of cohabitation between the spouses since the separation from bed and board, the legitimacy of the child born of the wife three hundred days after the separation may be contested. This is the supposed presumption relied on by the defendant, the universal legatee, the child whose legitimacy is disputed having been born three hundred and fifteen days after the judgment of separation. In estimating the force of the presumption claimed by defendant, the expression "may be contested" arrests attention as implying that more is required than the length of time to make effective the presumption. Accordingly, in a succeeding article, it is declared that in all cases specified in the Code in which the presumption of paternity ceases, the father, if he intends to dispute the legitimacy of the child, must do it within one month after the birth, or two months if absent when the birth occurs, or he shall be barred from ever making the objection. A delay of two months is granted the heir of the husband, if he dies before the delay allowed without the objection. Civil Code, Arts. 188, 191. It would seem, therefore, that the presumption invoked by the defendant utterly fails, if, as in this case, the husband dies without disputing the legitimacy of the child. Our Code does not define the disavowal required of the husband. The Napoleon Code left no doubt on this point, nor is there any under our jurisprudence. The French commentators distinguish between the action to contest legitimacy given to all interested, when, for instance, that status is assumed when no marriage existed, and the action "en desaveu" given to the husband

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or his heir. 4 Marcade, p. 18, par. 16. In either case, suit was required. The Napoleon Code uses the expression "desavouer," "reclamer," "contester," and to remove all question on the point, declares: "Toute acte extrajudiciare contenant le desaveu de la part du mari ou de ses heritiers, sera comme non avenü s'il n'est suivi d'une action en justice dirigée contre un tuteur *ad hoc* donné a l'enfant et en presence de sa mere." Napoleon Code, Art. 318. Our decisions have been in accordance with this view. Tate vs. Penn., 7 N. S. 558; Eloi vs. Mader, 1 Rob. 584; Dejol vs. Johnson, 12 An. 855; Saloy case, 44 An. 435. It is, in our view, clear, under our Code, that the legitimacy of the child of the wife not divorced, born after the judgment of separation of bed and board, can not be disputed, unless the suit is brought by the husband to disavow that legitimacy.

Our conclusion is fortified on this point by an examination of the articles of the Napoleon Code. That code announces, "L'enfant concu pendant le mariage a pous pere le mari," and that presumption is maintained except in specified cases. That code as it originally stood took no account of separation from bed and board not followed by divorce, as disturbing the presumption of paternity. Napoleon Code, Sirey, Art. 313. Article 313 now has this addition: "En cas de separation de corps le mari pourra desavouer l'enfant qui sera né trois cents jours apres l'ordonnance du president * * * l'action en desaveu ne sera pas admise s' il y a en reunion de fait entre les epoux." Dalloz les Codes Annotes, Art. 313. So under that code as under ours the action to disavow is essential, and birth after separation from bed and board merely is not enough to stamp the illegitimacy. See Arts. 312 to 316, Napoleon Code.

The argument of defendant is based on the theory that the child in this case is without and not within the presumption of the paternity of the husband of the mother. In this connection we have considered all the authorities including Art. 186 of our Code cited by defendant, which declares the judgment of separation puts an end to the cohabitation of the spouses. Of course, no action to disavow is requisite in those cases when the presumption of paternity absolutely ceases. 1 Robinson, 585, and Boilleux and other authorities there cited. But when we turn to our Code and the analogous articles of the Napoleon Code, we find the qualification of the presumption arising from birth after separation from bed and board, that the action to disavow must support the presumption.

Gaude vs. Williams.

This view of the controversy dispenses us from the examination of the testimony tending to show the child was not of the father and that of the contrary bearing, administered on behalf of defendant. The legitimacy of the child rests on another and impregnable basis.

On the question of the will in nuncupative form by private signature, we note the contention of plaintiff that there is no proof the testator caused it to be written. As we appreciate the testimony irrespective of that objected to, it is shown the testator presented the will to the witnesses and declared it to be his will. Civil Code, Arts. 1581, 1648. We think the legal requisite was fulfilled. Wood vs. Roane, 35 An. 865. But the will is reducible to the disposable portion. C. C., Art. 1493.

We think it best to reserve for future adjudication the questions of revenues to be accounted for, debts paid and improvements on the property claimed to have been made by defendant. These and other questions of account can best be adjusted when the executor files his account.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided, annulled and reversed, and it is now decreed and adjudged that Ross B. McNeely be and he is hereby decreed to be the legitimate child of Ludlow McNeely, deceased, and his wife, M. L. McNeely, and as such entitled to the *legitime* one-third of the property left by said deceased; that the will of said deceased in favor of his brother, J. H. McNeely, be and is hereby decreed to be reduced to the disposable portion, two-thirds of said property; that all questions of rents or revenues, improvements and debts, paid or to be paid, be reserved for further proceedings in the lower court, and that defendant pay costs.

No. 11,779.

JOACHIM GAUDE VS. C. C. WILLIAMS.

The sale of a plantation with reservation of a lot one hundred and twenty feet square adjacent to other designated property can not be made to embrace other lands not adjacent.

The dividing line was, in so far as relates to deeds properly located at the time the lot was reserved, along the railroad line.

It can not consistently with the deeds of sale be removed from that line.

It was designated at the time so as to include the land on which was defendant's store building.

Gauze vs. Williams.

The court holds that it must run as required by the description in the deed. It being manifest that error was committed by the defendant and one who preceded plaintiff as owner of the latter's land, in locating the lot not adjacent to the railroad, the prescription, therefore, of ten years, does not apply. The defendant refused to have the boundaries fixed: costs follow the judgment.

A PPEAL from the Eighteenth Judicial District Court for the Parish of Lafourche. *Caillouet, J.*

Beattie & Beattie for Plaintiff, Appellee.

Clay Knobloch & Son for Defendant, Appellant.

Argued and submitted April 25, 1895.

Opinion handed down May 6, 1895.

Rehearing refused June 27, 1895.

The opinion of the court was delivered by

BREAUX, J. This is an action of boundary instituted by the plaintiff to ascertain and fix the limit of his land from the land adjacent owned by the defendant.

The defendant opposed the survey, and contended that the boundary lines were fixed more than ten years prior to the suit; urged that he was a possessor in good faith, and invoked the prescription of ten years.

Plaintiff's title through mesne conveyances descends from the defendant.

From sale by the defendant in the year 1869, to his vendee, he excepted a lot of one hundred and twenty feet square, and identified it as adjoining the track of the railroad, now the property of the Morgan Louisiana & Texas Railroad, on which his store was located. As an incident of the suit a portion of the lot defendant reserved is in contestation.

A number of years subsequent to the sale the defendant constructed another building for a store.

Charles Espenan, now dead, one of plaintiff's authors, was the proprietor of the place (owned by the plaintiff) until April, 1886.

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He transferred it to Couteux.

The latter sold one-half of the tract to Charles Gauze in the year 1887, and in 1890 the other half to F. Justin and Joachim Gauze, which is the portion now owned by the plaintiff.

In the different deeds of sale a plat of survey annexed to the sale, passed before Charles G. Andry in 1884, under which Espenan became the owner, is referred to for description of the property. The lower line of the lot in question is represented as the upper line at that point of the railroad track.

While Espenan was the owner of the place now owned by the plaintiff, with the former's consent, the defendant had a fence built on his lines, as he evidently thought.

A plat of a recent survey offered in evidence shows three lines parallel with the railroad track.

One of these lines is thirty-five feet from the centre of the track, the other seventy-five and the last one hundred feet.

Many years ago the railroad company made embankments with earth taken from a place since known as a barrow pit. This pit extends some distance along the railroad, and has a width to about where is the one hundred foot line claimed by the railroad. A few feet above and along the pit there was during many years a fence.

If the line of fence be extended to the Bayou Lafourche as the correct line dividing the defendant's lot from the railroad track, defendant's upper line will encroach upon the land of plaintiff. If, on the other hand, the line be drawn parallel to and within a few feet of the track, the difference in measurement, if any, between the plaintiff and the defendant will be considerable.

The District Judge decided that the lower wall of defendant's store building should be the starting point, it being the building and grounds reserved by the defendant.

From this decision the defendant appeals.

The line of the defendant is contiguous to that of the upper line of the railroad. No other line can be drawn without disregarding the description in the deed. The evidence upon that point is clear and conclusive.

The difficulty arises in discovering marks designating the limit.

After searching the records, it seems that no written title has been discovered, which can throw light upon the limit of the railroad's right. Many years ago, without having to resort to proceeding of

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expropriation, and presumably with the consent of the owners, the railroad laid its track at that place. The result is that the precise width of the right of way is not known. The estimate based upon the original right varies from thirty-five, fifty, to more than one hundred feet from the road bed centre. At a time when the right was undefined.

The limit can not be extended on one side without assuming that the railroad company held by prescription.

However perfect its right may be, we would not be justifiable in determining that the railroad has a prescriptive right. The lapse of time alone is not sufficient to establish the right. Courts can not supply the plea, and it is of no avail until invoked as a means of defence or attack and determined. In justice to defendant's counsel we desire to state that they have made no such useless plea. We only refer to prescription in order to supplement it with the statement that we would not be disinclined to remand the case to ascertain limits if evidence of expropriation, sale or donation was within reach.

We return to the deed, in which the defendant reserved his lot, and find as a fact that he indicates it by "a store occupied by C. C. Williams and having a front of about one hundred and twenty feet by one hundred and twenty feet in depth," above adjoining the railroad. He was part owner of the building at the date of the sale, and occupied it as a store.

The mark was selected by the defendant, the selection was placed of record, and is now in the absence of any charge of error or fraud determinative of his right.

It can not be concluded that the store building was not included within the limit, in the face of the positive description to the contrary. It is urged that the fence, under which the defendant possesses, was placed where it is with the consent of a previous owner of plaintiff's tract of land, about fifteen years ago.

Under any theory of the case, adopting any of the lines, the fence can not be the limit. It is indicated on the plat by the letters G. S. T. R. The nearest point of the enclosure to the outer line of the railroad track is a distance of nine and one-half feet, and the line from that point, instead of running parallel to the railroad, diverges from its outer line and leaves a space irregular in shape, which manifestly the parties did not intend to leave between defendant's lot and the railroad line.

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Moreover, it is not the description for which the deed calls. The error is manifest and gives no support to the prescription of ten years.

The principle announced heretofore, that a mistake of this kind neither destroys title nor confers title, applies.

Owners are not bound by a consent regarding boundaries, fixed by themselves in error; without having left the matter to experts. *Gray vs. Couvillon*, 12 An. 780, 782.

The question of costs remains for our determination. The defendant was condemned in the District Court to pay costs of suit, and the plaintiff to bear half of the costs of survey and establishing the lines.

The defendant having denied the necessity of an action to settle the boundary, owes costs of suit. *Tircuit vs. Pelanne*, 14 An. 215.

It is therefore ordered, adjudged and decreed that the judgment is affirmed at appellant's costs.

No. 11,822.

THE STATE OF LOUISIANA EX REL. THE LOUISIANA CONST. UCTION
IMPROVEMENT COMPANY VS. JOHN FITZPATRICK ET AL.

The duty is imposed on the Commissioner of Streets to see that produce and goods landed on the wharves are laid as near as possible to the paved part of the levee; also to have removed obstructions and encumbrances.

The performance of that duty need not, necessarily, be preceded by his order to remove all goods and wares to warehouses, at the owners' expense, forty-eight hours after they are discharged on the wharves.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

James R. Beckwith for Relator, Appellant:

In any public statute where power is given to public officers to do any public act in permissive language, as that they "may" do the duty, or act, or thing, the language will be regarded as peremptory whenever the public interests or individual rights call for its exercise; in all such cases, the language, though permis-

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sive in form, is, in fact, peremptory. *Snpervisors vs. United States*, 4 Wall. 435; *Galena vs. Amy*, 5 Wall. 705, 709; *Potter's Dwarris*, 220, with note; *Sutherland on Statutory Laws*, p. 597.

E. A. O'Sullivan, City Attorney, *B. McCloskey*, of Counsel, for Appellee:

Where a contract with a municipal corporation is susceptible of two meanings, the one restrictive and the other extending the powers of the corporations, that construction is to be adopted which works the least harm to the State. *The Law of Incorporated Companies Operating Under Municipal Franchises*, Vol. 2, pp. 210 *et seq.*; *Stein vs. Bienville Waterworks*, 141 N. O. 68; 3 Wall. 531.

The Legislature can not part with any of the police powers of the State, which are matters affecting the public health, morals, public convenience, etc. *Farmers Loan and Trust Co. vs. Stone*, 30 Fed. Rep. 270.

A municipal corporation is but a subordinate branch of the government, but represents it in a limited district for special purposes. *Chisolm vs. City of Montgomery*, 2 Woods, 584.

Where the statutes are couched in words of permission or declare that it shall be lawful to do certain things or provide that they may be done, their literal significance is that the persons, official or otherwise, to whom they are addressed are at liberty or have the option to do these things or refrain at their election. *Sutherland on Statutory Construction*, 593, 594.

A remedial statute must be construed largely and beneficially so as to suppress the mischief and advance the remedy. And if its words are not clear and precise such construction will be adopted as shall appear the most reasonable and best suited to accomplish the object. A construction which would lead to an absurdity will be rejected. 33 Ala. 674; 60 Wis. 133; *Sutherland on Statutory Construction*, 1523.

Argued and submitted May 25, 1895.

Opinion handed down June 8, 1895.

Rehearing refused June 27, 1895.

The opinion of the court was delivered by

BREAUX, J. The intent of the Council of the city of New Orleans, as expressed in an ordinance adopted in 1880, authorizing the administrator of commerce to order the removal of produce and goods from the wharves and levees forty-eight hours after the receipt or discharge of the cargo, is before us for interpretation and construction.

After notice by that officer to the owners or consignees, if they failed to comply with the order, the language of the ordinance is: "The administrator of commerce shall take possession" of the goods and wares and store them at the expense of the owner.

In the second section of the ordinance it is provided, substantially: If the name of the owner of the property is not disclosed, the officer is authorized to dispense with the notice prior to removal.

The duties of the administrator of commerce are imposed on the commissioner of public works under the city charter of 1882. The latter is the successor with authority in the premises.

The relator, as lessee, whose term of lease dates from May, 1891, complains of the failure of the commissioner of public works and of the Mayor to enforce that ordinance, and brings this action for an alternative writ of *mandamus* to compel the former, the Mayor, to bring about the enforcement of the ordinance, and the latter, the commissioner, to perform the duty imposed upon him to issue needful notices to the owners, shippers or representatives of goods, wares and merchandise, and to use the means provided by the ordinance to enforce observance by owners and others interested. The respondents urge in their defence that the functions of the Mayor and commissioner of public works are defined, and that upon the failure of the latter to perform his duty he can be held upon his bond.

They controvert the allegations of plaintiff and pray that the *mandamus* be refused.

The vice president and general manager of the plaintiff corporation testified as to the condition on the wharves and as to demands for the enforcement of the ordinance.

Contra: the commission testified for respondents and denied the charge of negligence.

The testimony of these two witnesses was the only testimony heard

save certain ordinances of the council, germane to the issue introduced in evidence, and the contract of lease between relator and the city, and a correspondence between the former and the mayor and commissioner, running through a number of months, in which are portrayed the grievances of the relator, and the varied disagreements and differences between the relator and the respondent.

From a judgment dismissing the provisional writ and refusing to grant the application, relator prosecutes this appeal.

A duty is imposed upon the commissioner of streets to require that all products and goods landed on the wharves be laid as near as possible to the paved part of the levee, approaching the street.

The ordinance is equally as positive regarding obstructions and encumbrances on the bank of the river.

The commissioner is given full power to enforce the provision of the ordinance. If, in order to carry out the provision of the ordinance, it becomes necessary to order the removal of the produce, goods and wares, after the forty-eight hours in question, he is vested with authority to act.

The ordinance in regard to this authority—i. e., to remove the goods after forty-eight hours—is not expressed in mandatory terms.

“Duty” and “shall” are the words used and applied; except as to the preliminary order to remove. Here the commissioner is not commanded, but he is “authorized.” If necessary to accomplish the purpose of the ordinance, he may require the immediate removal after the time specified in the ordinance.

The law affects large public interests and it requires, as a condition precedent to the removal of all goods and produce to warehouses, that some discretion should be exercised.

He “may,” but no provision has been made that he “shall” order the removal of the goods and produce (after forty-eight hours).

The dictates of reason and the suggestion of experience do not support the strict construction placed by the relator upon its contract of lease regarding the forty-hour clause of the ordinance, adopted many years prior to his lease, and the enforcement of which clause was attempted only once we are informed, many years ago.

It was surely not within the contemplation of the council to have pronounced offending goods all goods on the wharves forty-eight hours after the landing and discharge without regard to the necessity

of clearing the wharves or the advisability of extending the time of removal.

It would follow, if the authority given to the commissioner to order the removal was mandatory, that all produce, goods and wares would have to be hauled away and stored immediately after the two days in question.

Whether the removal is necessary or not, not an article of any kind would be permitted to remain on the levee. We do not think that such is the sense of the ordinance.

We do not understand that the respondents absolutely refuse to act and decline altogether to enforce the ordinance.

If they are negligent or if they misconstrue the terms and conditions of the lease, it is not the purpose of the writ to redress special acts of negligence or to have disputed clauses interpreted, save that relating to the removal of goods after forty-eight hours. This clause only is invoked as a remedy.

The first section of the ordinance is taken by the relator as imposing an imperative duty on the officer named, under the "authority" of the ordinance with which he is entrusted. This is the extent of the relief asked, and which we must decline to grant.

This being the case, we are not called upon to pass upon questions regarding obstructions on the wharves and the removal of goods which may have remained on the wharves an unreasonable length of time. Such is not the issue.

The officer is vested with certain discretion, not to unnecessarily haul away and store goods in warehouses at the risk and expense of the owners.

It does not follow that he can overstep the bounds of his authority.

If he does, there is ample remedy without divesting him of discretionary authority to be exercised in the interest of commerce.

The judgment appealed from is therefore affirmed.

No. 11,708.

WIDOW AND HEIRS OF D. L. SIMONIN VS. OSCAR CZARNOWSKI.

Where the *mortuaria* in a succession show the confirmation of a natural tutrix and under-tutor to the minor children of a deceased person, an inventory signed by them, proceedings of a family meeting, homologated by the court upon a *proces verbal* regular in every respect, approved by the under-tutor, an order of sale, based on those proceedings, followed by a sale on the terms fixed, a final account and tableau of distribution signed by the tutrix, approved by the under-tutor, and homologated by the court, carrying the proceeds of the sale to the credit of the succession and the balance to the payment of a debt declared to be due the purchaser at the sale, and an order finally made by the court, upon the application of the tutrix, after a hearing contradictorily had with the under-tutor, canceling the mortgage upon the property of the tutrix, on the allegation that the property of the succession had all been disposed of, had proved insufficient to pay its debts and left nothing for the minors, it can scarcely be asserted that the administration of the succession was a "fictitious" one, or claimed that the purchaser at the public succession sale could be proceeded against by a petitory action, ignoring the succession proceedings. To reach the purchaser and the property sold, actions of nullity were essentially necessary.

Though the tutrix may not have known the "name" of the particular attorney who conducted the succession proceedings in her name, and may not have employed that particular attorney, or authorized any one to employ him, it does not follow that the proceedings taken through the attorney were null and void; they must stand, if, with her consent, "an" attorney had been employed and she had acted upon proceedings taken out in her name by him.

If the property of a succession is sent to sale to pay debts by reason of the administration having no funds wherewith to pay the same, the sale will stand if the debts actually due were such as to call for the sale, although the application for the sale may have set forth a larger amount as being due than really existed.

If a purchaser of succession property, at a succession sale, pays a portion of the price to meet privileged claims, receives a deed in which it is declared that he retains the balance in his own hands, secured by special mortgage and vendor's privilege in favor of the succession, conditioned to meet all claims which might be adjudged prior to his own, and subsequently an account is filed and regularly homologated, in which he is recognized as a creditor for the retained balance, the adjudication to him can not be treated as an absolute nullity on a claim that he was not a creditor of the succession, or a creditor to the amount he asserted himself to be.

The fact of the homologation of a final account without the production of vouchers in support of the claims therein set forth loses in an "action of nullity" the force which it would have on an "appeal."

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Heirs of Simonin vs. Czarnowski.

Clegg & Thorpe and Fred. Adolph for Plaintiffs, Appellees:

Cite 33 An. 615; 34 An. 288; 15 An. 569; 10 An. 18; 4 Rob. 204; 43 An. 263; 129 U. S. 86; 5 R. 288; 2 An. 785; 33 An. 615; 46 An. 1816; 12 An. 545; Abbott, Trial Ev. 236.

William W. Howe for Defendant, Appellee:

Cites C. P. 986, 613; 36 An. 780; 38 An. 379, 885; C. C. 3542, 3543; 3544, 3478; 27 An. 576; 4 R. 23; 21 An. 353; 37 An. 417; 38 An. 863; 28 An. 626; 24 An. 260; 26 An. 587; 96 U. S. 617; 99 U. S. 513; 143 U. S. 250; 102 U. S. 79; 7 An. 95; 156 U. S. 454; 29 An. 493; 30 An. 853, 1071; 13 L. 125.

Argued and submitted May 8, 1895.

Opinion handed down June 3, 1895.

Opinion refusing rehearing June 29, 1895.

D. L. Simonin, the husband of one of the plaintiffs and father of the others, died in New Orleans on the 4th of March, 1868, leaving a number of minor children, the youngest of whom was born in 1864. His succession was opened on the 10th of July of the same year through an application of his widow to have an inventory made, herself confirmed as natural tutrix and an under-tutor appointed. She confirmed as such under an order of the judge on the same day. Oscar Simonin, an uncle of the children, was appointed and confirmed as under-tutor. John J. Finney, attorney at law, appeared as acting for the widow in the original petition, and as acting for her as natural tutrix throughout the whole of the legal proceedings except in the special instance hereafter referred to.

An inventory was taken at her instance on the 15th of July, which she signed, as did the under-tutor. On September 4 a petition was presented in the court in her individual name and as tutrix, in which it was recited that the succession of her husband was largely indebted to Oscar Czarnowski, who was the sole creditor of the succession, and that when all the necessary expenses attending the settlement of the succession were paid the entire assets would be un-

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able to pay the said sole creditor (Czarnowski) in full; that neither herself nor her children possessed anything in her or their own right, and that she and they were in necessitous circumstances, and that she was by law entitled to one thousand dollars out of the assets of the succession for the benefit of her minor children. That the household furniture inventoried had been appraised at \$550; that she thought it would be of advantage to the minors to retain the furniture in kind, and that the sole creditor, Czarnowski, was willing to permit her to retain the same at its appraised value as part of the one thousand dollars allowed her by law.

That in order to pay Czarnowski and defray the expenses attending the settlement of the succession, it was necessary to sell the real estate; that in order to deliberate on the propriety of making the sale it was necessary that a family meeting should be convoked. She prayed for the convocation of a family meeting, to be composed of certain persons whom she names (relatives of the minors), and that she be authorized to retain the household furniture, the consent of the sole creditor being considered. Accompanying the petition was the written consent of Czarnowski to her retaining the furniture.

A family meeting was ordered to be convened, as prayed for, and it was held on the 12th of September, before DeArmas, notary, composed of the parties selected: James Hamilton, Charles Parker, Julius Czarnowski, Theodore Konigslow and Frederic Konigslow, Charles Parker being a nephew of Mrs. Simonin and the two Konigslows her half-brothers. The notary, in his *proces verbal* of the meeting, after making the usual declarations as to the order by virtue of which he was acting and embodying therein in full the petition of the widow and tutrix and showing the observance of the formalities and requirements of law exacted in the matters of a family meeting, recited that after mature deliberation the members of said family meeting declared that, inasmuch as the estate of the late D. L. Simonin was, within their personal knowledge, heavily indebted, and there were no ready funds to meet said debts, including the cost of settlement of said succession, they were therefore unanimously of opinion that it was necessary to sell the real estate in order to liquidate the succession. That they were of the opinion and recommended that one-half of the price should be paid cash and one-half at a credit of one year, with eight per cent. per

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annum from date of sale, with the usual guarantee of special mortgage and vendor's privilege, and the members declared that they were unanimously of opinion that the widow should be authorized to keep the household furniture at its appraised value of \$558, in part payment of the \$1000 allowed by law to her and her minor children. The under-tutor approved these deliberations and signed the *proces verbal*.

On the 17th September, upon a petition of the widow and natural tutrix, the proceedings of the family meeting were homologated and the sale recommended was ordered to be made on the terms and conditions fixed.

The property was adjudicated to the defendant on the terms and conditions ordered on the 11th January, 1869.

On the 15th of January, 1869, a petition was filed by John J. Finney, attorney at law, in the name of the widow and natural tutrix, in which it was declared that she had prepared and therewith presented as annexed to and made part thereof a tableau of distribution and account of her administration as tutrix; that the same contained a true and faithful account of all the claims which have been made against the succession, and that the proceeds of the sale sold on the 12th January, 1869, were the only assets of the succession. She prayed that after legal delays and due legal advertisement the account be approved and homologated, and that she be authorized to pay off all the claims as therein set forth. The account annexed to the petition was signed by the tutrix and approved by the under-tutor. On the 20th January, 1869, a judgment was rendered declaring that, on producing to the court due proof that the account filed by Mrs. Widow Simonin in her capacity of natural tutrix, as such administering the succession of her deceased husband, D. L. Simonin, has been advertised according to law and that no opposition had been filed thereto, it was ordered that the account be approved and homologated, and the funds distributed accordingly.

The account showed privileged claims to the amount of *one thousand and twenty-six dollars* and an ordinary debt of *three thousand nine hundred and seventy-three dollars* as due to Oscar Czarnowski.

The only asset brought on the account was the proceeds of the sale of real estate, five thousand dollars.

After deducting the amount of the privileged claims from the amount of the proceeds of sale, accountant showed a balance of three

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thousand nine hundred and seventy-three dollars, which she declared Czarnowski retained after advancing the amount necessary to pay off the privileged claims (one thousand and twenty-six dollars), his claim covering the balance.

Among the privileged claims was an amount of four hundred and fifty dollars carried on the account as "Balance of one thousand dollars due the widow and heirs after deducting the appraised value of the household furniture which she was allowed to retain by order of court."

On the 14th May, 1870, a motion was filed in the succession of D. L. Simonin to the following effect:

"On motion of Hornor & Benedict, attorneys for Appoline Simonin, natural tutrix of the minor children, issue of her marriage with deceased, and on showing to the court that she has rendered her final account herein by which the whole property of the succession was distributed, there not being sufficient to pay debts. That there remains nothing for the minors, but that the clerk of this court has recorded her certificate of tutorship and that such record operates as a mortgage upon a certain lot (described in the motion). It is ordered by the court that Oscar Simonin, under-tutor of said minors, do show cause on Saturday, May 14, 1870, why said mortgage should not be canceled."

The rule was taken up on the day fixed, the under-tutor being present. The rule was made absolute, and the recorder ordered to erase from his records the inscription of the certificate of tutorship of Mrs. Widow D. L. Simonin as natural tutrix of her minor children (naming them), in so far as it affected the described property. Over twenty-three years elapsed between the sale of the property to the defendant, the homologation of the account, and the distribution of the funds under the orders of court, and the date of the filing of the present suit by the widow and heirs of Simonin (September 10, 1892), and that at that date the youngest child, Cora Simonin, was about twenty-eight years old.

The prayer of the widow and heirs of Simonin in the present suit is that there be judgment in their favor, setting aside the judgment, homologating the proceedings of the family meeting, and the order for the sale of the property as having been illegally and improvidently granted, annulling and avoiding the pretended sale of the property on the 11th January, 1869, to the defendant; that it be re-

stored by him to the succession, and that he be condemned to pay nine hundred dollars rent per annum from 11th January, 1869, as a possessor in bad faith.

In addition to the defence set up in the answer defendant pleaded prescription under Arts. 3479, 3485 and 3487 of the Civil Code; also the prescription of one, three, five and ten years, and prescription under Arts. 3392, 3478, 3498, 3542 and 3543 of the Civil Code.

The District Court rendered judgment in favor of the plaintiffs, declaring null and void the sale of the property to defendant, ordering it to be restored to the widow and heirs of Simonin, and condemning defendant to pay as rent the sum of twelve thousand dollars, with interest from the date of judgment, subject to a credit of eight thousand nine hundred and seventy-three dollars, which the court allowed the defendant upon a reconventional demand contingently set up by him.

Defendant appealed.

In answer to the appeal plaintiffs prayed that one of the items of the reconventional demand be rejected entirely and another reduced.

The opinion of the court was delivered by

NICHOLLS, C. J. Counsel of plaintiffs, on the argument, conceded that their demand was barred by prescription unless they could succeed in sustaining the position contended for by them that the only prescription applicable to it was that of *thirty years*.

They contend that the present is substantially a petitory action; that the property of the succession is in the illegal possession of defendant, under guise of a succession administration which had no reality but was a fraudulent simulation concocted by him to despoil the widow and heirs of the deceased of their property; that without authority he opened the succession and employed an attorney to conduct the mortuary proceedings, who, under false representations received from his employer, made to the court recitals of fact which were absolutely without foundation, to the effect that the deceased was heavily indebted to him; that on the strength of these false statements the court was induced to issue an order for the convocation of a family meeting on behalf of the minors to consider the necessity and propriety of a sale of the real estate in order to pay his and other claims against the succession; that the family meeting

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so ordered, acting also on the faith of these false representations, recommended a sale, and their proceedings were erroneously and improvidently, through the fraud of defendant, homologated by the court and a sale ordered; that a sale followed for cash, instead of on the terms fixed by the family meeting, at which an adjudication was made to defendant; that he paid no portion of the price, but illegally retained it, under pretence of holding a large claim against the succession; that he subsequently fraudulently caused the homologation of what purported to be an account of tutorship filed by her, in which she is made to recognize his claims and consent to their being paid out of the proceeds of the sale; that throughout these whole proceedings the real actor was the defendant himself and not the widow and tutrix; that his relations with Simonin and his family had been close, confidential and fiduciary, and his conduct in this matter was treacherous and illegal.

That he availed himself of his intimate connection with the family to obtain possession of papers of the deceased upon which, so obtained, he bolstered up an unfounded claim against the succession, and that the case presents a condition of affairs such as to throw it under the decisions of this court in *Bledsoe vs. Irwin*, 33 An. 615, and *Gillespie vs. Twitchell*, 34 An 288.

In view of the gravity of the charges brought against defendant, and the fact that they were sustained by the judgment of the District Court, we have examined the testimony in this case with special care, and we have reached the conclusion that the judgment can not stand. In the first place, there is nothing to warrant the statement that defendant's relations toward Simonin and his family were fiduciary, or that he ever obtained possession of papers illegally or improperly.

There is no doubt that the relations between all parties up to the death of Simonin, and for some time thereafter, were close and intimate, such as would naturally arise and be found between relatives, but nothing more. It is a mistake, we think, to speak of Simonin as the benefactor of the defendant. He seems, from the time he reached New Orleans, to have been industrious and self-supporting, and at the date of Simonin's death he was a man of means. He had unquestionably received from Simonin various acts of kindness, it being shown for instance that when wounded as a soldier he was an inmate for some time of his house. For some

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reason not directly disclosed, there occurred about the time of the opening of the succession an estrangement between the defendant and some of the members of the family. We do not think it arose from any dispute as to the claims of indebtedness which defendant has set up as due to him, but from other causes. The widow charged in her petition, and she subsequently supported the charge by an affidavit, that she did not employ Mr. Finney as an attorney, and gave no one directly or indirectly authority to do so. That fact can be conceded, and is doubtless literally true, but it does not lead up to the result which is contended for as flowing from it. Though Mrs. Simonin may not have known the "*name*" of the particular attorney who conducted the proceeding, and neither employed him herself nor gave others power to do so, we think it established that she was aware that the succession had been opened in her behalf by *some* attorney, though she may have been ignorant of, as she doubtless was indifferent to, his identity. We think the opening of the succession and the employment of an attorney was with her knowledge and by her consent, express or implied.

Defendant testifies that he was employed actually by Charles Parker, Mr. Simonin's nephew, and that he recommended him. Her action (after a petition had been filed in her name, asking for confirmation as natural tutrix) in going forward and taking and subscribing her oath as tutrix indicate clearly that she was advised of the petition. It can scarcely, we think, be asserted, after a tutrix and under-tutor had been qualified, that the administration was a "pure simulation." The succession was certainly "*opened*" independently of any question as to whether the attorney who had invoked the court's action was *individually* specially authorized in that behalf or not.

In the next place it is clearly shown that the widow and tutrix was informed of the fact that defendant claimed to be a creditor of the succession, and that a sale would be sought in order to pay those claims. A family meeting was convoked, of which her two step-brothers (the Konigsnows) and her nephew, Charles Parker (who was an inmate of her family), were members. Not only this, but the under-tutor of the minors (who was their uncle) was present, approved of the proceedings and signed the same. Ignorance of this particular proceeding by the tutrix under such circumstances would be hard to believe. It is attempted to be shown by the two Konigs-

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lows that the family meeting was itself a mere simulation—that it really did not take place as recited, but we would be slow to accept their statements as to such gross violation of duty by a sworn officer, who had no possible interest in falsifying his records. To believe this would be to bring not only the notary but all the members of the meeting and the witnesses into willingly certifying by their signatures to a state of facts which had no existence. Now, if the tutrix knew (as she undoubtedly did as well then as now) that Czarnowski claimed to be a creditor of her husband and that he was about to enforce his rights, it is extraordinary if she did not at that time believe them to be well founded, and if they were, as she now says they were, pure fabrications, why she or some one of the relatives of the minor failed to say a word in opposition to the sale or to the recognition of the defendant's pretensions. Without expense, without trouble, defendant's whole scheme, if such it was, would have been instantly broken up. It is difficult to realize that this man's influence and control for wrong doing extended over every person who had anything to do with this succession. It is claimed that the adjudication to the defendant of the property was for cash instead of the terms fixed by the family meeting. That was a most serious allegation, and caused us to direct our attention at once to the subject. We do not find the averment borne out. The adjudication followed the court's order, one-half cash, one-half on credit. The adjudication is one thing—the subsequent act of sale between the parties is another. It appears that after the adjudication had been made the auctioneer who had been ordered to make the sale made a deed to the defendant in which payment of the price was provided for in a manner different from what the terms of sale called for and different from that which would have been followed had the property been bid in by a person having no connection with the succession. As it was the adjudicatee, claiming to be a heavy creditor of the succession, paid into the hands of the auctioneer one thousand and twenty-six dollars, and retained with his consent the balance, secured by special mortgage and vendor's privilege in favor of the succession, subject to the orders of the court to be rendered upon the final homologation of the tableau or account of liquidation of the succession in case there should not be a sufficiency to meet all debts and costs having preference over and before the claims of the purchaser.

This course has been several times recognized as one authorized

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to be followed. It would be too late to urge this objection in this particular case now, even if it were irregular. The tableau filed, which showed that fact, was approved by the under-tutor and by the court; all the debts of the succession were paid, and the exact balance retained by the purchaser was adjudged and decreed to be due to him. The one thousand and twenty-six dollars which were actually paid by the adjudicatee was the amount of the privileged claims due by the succession.

It is charged that there was no debt due to Czarnowski at the time of the family meeting and sale. We think differently. He held possession at that time of a mortgage note of the deceased which had been secured by mortgage on this very property, and on the trial of this cause he produced the note and swore positively to the fact that he had himself taken it up and paid it for Simonin in 1868, shortly before his death. He further swore that he had made several payments of interest upon the note for the benefit of Simonin. He had also taken up a due bill of eight or nine hundred dollars, due by Simonin to his sister-in-law, Mrs. Parker.

Plaintiffs seek to avoid the effect of this testimony as to the mortgage note by showing that in the account filed by the executor of the succession of Pennison in 1864, this note, which had belonged to that succession, was put down as having been already at that time collected by the executor. We think this attack has been successfully met by the signed endorsement of Simonin himself on the note in 1867, showing that it was on that date extended as to payment to January, 1868. We think it quite likely, as suggested by defendant's counsel, that the executor, willing to consider, did consider the note as so much cash in his hands, and settled with the heirs on that basis, keeping the note himself.

We need not go into any critical examination of the amount due to Czarnowski at the dates of the family meeting, or the sale, for the reason that in so far as the *validity of the sale* was concerned it would stand even if the amount due him was less than he claimed it to be. The succession undoubtedly had no funds in hand, and it owed debts to some extent independently of the debt due to Czarnowski. The property was properly sent to sale to pay those debts, and if Czarnowski's claim was smaller than he asserted it to be, the effect of that fact would be not to undo the adjudication, but to charge him with any difference there would be between the amount of his bid,

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the cash paid by him, and the amount actually due to him. *Lynch vs. Kitchen*, 2 An. 845; *Gay vs. Hebert*, 44 An. 306, 307; *Truxillo vs. Delaune et al.*, 47 An. 16; *Amato vs. Ermann & Cahn*, 47 An. 967.

He would simply have come under a money liability for so much of the purchase price as remained unpaid, and prescription would run in his favor from the date of the homologation of the account. If prescription was permitted to accrue, the tutor was responsible for it.

Plaintiffs say it is a strange fact that the amount placed in the account as due to the defendant should have been the exact amount necessary to absorb the balance of the assets left after the payment of the privileged claim, but we see nothing suspicious in that circumstance. He had claimed to be a creditor for over nine thousand dollars, and he still claims to have been such, but as the succession was insolvent there was no necessity to make him figure on the account for an amount larger than he could ever possibly get.

Plaintiffs say the account was homologated without the production of vouchers. This would have been of importance on an appeal, but it loses its force in an action of nullity.

The tutor and under-tutor, after the sale, both signed the final account which the tutrix presented, in which Czarnowski's claim was recognized and ordered to be paid by the court, and after everything was closed the tutrix presented to the court, in the matter of the succession, not through John J. Finney, but through Hornor & Benedict, as her attorneys, a motion in which the fact is stated that the property of the succession had been disposed of; that it had been found insufficient to pay its debts; that there remained nothing for the minors, and that the mortgage securing her tutorship should, therefore, be canceled on a piece of property in which it seems it was found she had an interest. It is claimed in this instance, again, that the attorneys who represented her had not been employed by her, but her mother; but her brother's testimony shows the contrary. It was he who employed the attorneys, and he did so after consultation with, and with the consent of, his sister. It is not pretended they were employed by Czarnowski. We do not understand how it can be claimed that the administration of a succession was in any sense a fictitious administration, which was opened by the appointment and confirmation of a tutor and under-tutor, evidenced

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by their signatures, and closed by a final account, signed by the tutrix, signed and approved by the under-tutor, and homologated by the court, followed by a cancellation of the minor's mortgage at the instance of the tutrix, through a decree taken contradictorily with the under-tutor upon an application in which the various proceedings which had taken place in the succession, and the final result thereof, were referred to. The present is not purely, as claimed, a petitory action. It was essentially necessary, in order to reach the property in litigation in this case, that actions of nullity should have been instituted within the prescriptible period, but had such actions been brought as against defendant's title, we do not see how, under the evidence, it could have been shaken. If defendant was open at all to attack it was upon a moneyed demand, based upon his purchase, on the theory that the succession was not indebted to him to the full extent which he claimed it was.

The court below seems to have placed the defendant in the position which he would have occupied at the opening of the succession, claiming to be a creditor with his claim resisted by the widow and tutrix. Obviously this is not the position he occupies. *McGehee vs. McGehee*, 41 An. 657. The plaintiffs are attacking and seeking to undo accomplished facts twenty-three years after they have taken place, through regular judicial proceedings, and it is not astonishing that defendant was unable to remember or to answer the many questions propounded to him under a most rigid cross-examination, many of which questions were as to collateral and irrelevant facts.

In order to sustain plaintiff's theory of the facts of this case, both forgery and perjury would have to be proven by them. There is nothing in this record, in our opinion, to justify the charges brought against defendant's good name.

For the reasons herein assigned it is hereby ordered, adjudged and decreed that the judgment appealed from be and the same is hereby annulled, avoided and reversed, and it is now ordered, adjudged and decreed that there be judgment in favor of the defendant, against the plaintiffs, rejecting plaintiffs' demand and dismissing their suit, with costs in both courts.

ON APPLICATION FOR REHEARING.

WATKINS, J. This is a suit for the annulment of a judicial sale of certain real estate situated on Thalia street, in the city of New

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Orleans, which was adjudicated to the defendant on the 12th of January, 1869, under an order of sale made in the succession of D. L. Simonin, deceased, for the purpose of paying debts of the deceased.

Plaintiffs' prayer is for judgment revoking the proceedings of the family meeting leading up to the order of sale, and the order of sale as well; and also condemning defendant to pay nine hundred dollars *per annum* rent since date of aforesaid sale.

The principal reasons assigned in the petition are that the recommendations of the family meeting of September 4, 1868, favoring a sale, and suggesting the necessity thereof, were solely predicated upon the fact that the deceased was indebted to the defendant, and that, upon those representations, the order of sale was granted, directing a sale to be made upon terms to correspond with the recommendations of the family meeting.

That at the sale the property in question was adjudicated to the defendant, ostensibly for five thousand dollars in cash, whereas the terms proposed by the family meeting were one-half the price in cash, and the balance on a credit of one year, with interest.

That in fact deceased was not indebted to the defendant, but through fraud and ill-practices he induced the erroneous belief that deceased was indebted to him, and, through their fraudulent representations, defendant induced the surviving widow and tutrix to sign an account of administration recognizing said debt.

That the statement in the account, as well as that in the deliberations of the family meeting, was made in error, and through the defendant's misrepresentations and procurement.

For the foregoing reasons, mainly, plaintiffs allege that the sale to the defendant was a fraudulent simulation in the form and under the guise of a judicial proceeding and sale, suggesting some few irregularities, which are curable by five years' prescription.

After tendering quite a number of exceptions and dilatory pleas, defendant made an answer, which was practically a general denial.

It is evident that the main question in the controversy was, and on this application must be, the existence *vel non* of an indebtedness of the deceased and of his succession to the defendant at the time the order was granted, and the sale of the property occurred. All else, at this late day, more than twenty years after the adjudication, must be esteemed of but little moment, in defendant's title.

The District Judge, in his reasons for judgment, recognized this to be the controlling question in the case, for he says:

"With the exception of court costs and expenses of last illness, the entire indebtedness of the succession was to the defendant Czarnowski. If that indebtedness was a real one there was full justification for Czarnowski's action and almost exclusive control of the mortuary proceedings. If it was a fictitious one, then his assumption of control was a suspicious intermeddling, forming part of a scheme of spoliation through the forms of law."

Taking this as the initial point in the controversy, what are the grounds on which he sustains plaintiffs' claims and gives them a judgment?

He starts out with the proposition, that as Mrs. Simonin was contradicted, he disbelieved her testimony, and for certain reasons he viewed the testimony of the defendant with the greatest caution.

He then assigns as his reasons why he disbelieved in the existence of the defendant's claim: (1) That no statement of this indebtedness was furnished until after the adjudication, and when filed it gave no particulars; (2) that by defendant's own account, the deceased owed defendant only eight hundred and eighty dollars and sixty-seven cents on June 27, 1867, prior to his death, whereas it was increased to five thousand six hundred and eighty-two dollars and sixty-six cents after his death, and this included one thousand five hundred dollars and interest on a mortgage note; and this item seems to have been paid on the 29th of January, 1869, after the filing of the final account; (3) that it is shown by the records of the Peniston succession that the mortgage note in question was paid before the death of the deceased; but the judge stated that he could not, at the time he prepared his reasons, find any of the records of the succession of Peniston after diligent search.

These are all. He then adds:

"On the whole, and without entering into a critical analysis of the testimony and other evidence * * * I am now satisfied of the correctness of the impression left on my mind at the close of the trial, that there existed in favor of Czarnowski no claim against Simonin at the date of his death."

Our opinion takes up and fully and satisfactorily disposes of the matter by the statement that, prior to the death of Simonin, the defendant took up the mortgage note of the deceased; and that he retained it in his possession and produced it on the trial, and supported the correctness of this assertion by his sworn evidence. He further

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states that he made several payments of interest on that note for the deceased; and had taken up for him a due bill of eight hundred or nine hundred dollars due by deceased to his sister-in-law, Mrs. Parker.

With regard to the payment of the note to the succession of Peniston, to which it belonged, our opinion says this attack "was successfully met by the signed endorsement of Simonin himself, on the note in 1867, showing that it was on that date *extended* as to payment to 1st of January, 1868," as contradistinguished from the allegation that it was paid in the Peniston succession in 1864.

This relation of proven and indisputable facts puts a *quietus* on the question of debt, and on the crucial question proposed by the District Judge; consequently the irresistible conclusion was, and still remains, that judgment ought to go in the defendant's favor on the title.

We note, in this connection, that this question is not mooted in either the application or brief for rehearing. Its correctness thus stands confessed.

No. 7241.

E. T. PARKER, ADMINISTRATOR, vs. JOSEPH BILGERY ET ALS., ON
MOTION TO DISMISS.

It appearing that since the appeal was obtained, and the transcript lodged in this court, the appellants became adjudicatees of the judgment appealed from at a public auction sale, said fact operates, necessarily, as an acquiescence in the judgment, and will result in the dismissal of the appeal.

A PPEAL from the Fourth District Court for the Parish of Orleans.
Houston, J.

Frank L. Richardson and Emile Pomés for Plaintiffs, Appellees, for the motion.

Rouse & Grant for Defendants, Appellants, *contra*.

Submitted on briefs May 11, 1895.

Opinion handed down June 8, 1895.

Opinion refusing rehearing June 27, 1895.

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ON MOTION TO DISMISS APPEAL.

The opinion of the court was delivered by

WATKINS, J. The ground on which appellee seeks the dismissal of the appeal is that the appellants have acquiesced in the judgment appealed from since that appeal was taken.

The judgment appealed from is one obtained by the succession of Francois Lacroix, of which E. T. Parker was administrator, against the succession and heirs of Joseph Bilgery, numbered 44,498 of the docket of the Fourth District Court of the parish of Orleans, which was rendered and signed on the 24th of October, 1878, and one supplementary thereto, which was rendered and signed on January 31, 1879, now pending on appeal in this court; said judgment decreeing that the succession of Francois Lacroix is the owner of a certain lot of ground, and recover from the widow and heirs of the late Joseph Bilgery the sum of nine hundred and ninety-nine dollars and seventy-five cents, to be paid in certain designated proportions, not necessary to be particularly mentioned.

It is from that judgment that the heirs of Bilgery are appellants.

Ernest Cuculu having become administrator of the estate of Francois Lacroix in place of E. T. Parker, the motion to dismiss is made in his name.

The ground of the motion is to the effect that since the taking of the appeal the heirs of Joseph Bilgery have acquiesced in the judgment by attempting to buy said judgment at a pretended judicial sale at a public auction, though said sale was made without authority, and while the succession, appellee, was not represented; and further, that said appellants have appeared in the suit of Ernest Cuculu, Administrator, vs. J. M. Bilgery *et als.*, No. 41,466 of the Civil District Court, and filed an answer, averring themselves to be the owners of the real estate claimed in this cause by virtue of their pretended purchase at said sale, as will appear by a certified copy of said petition and answer hereto annexed.

Appellants appeared and answered the motion to dismiss, and averred and represented that the "judgment recovered by said E. T. Parker, administrator as aforesaid, from which the appeal herein was taken, and the claim in that suit was sold on the 7th of March, 1879, at public auction by Placide J. Spear, after due proceedings and advertisement, pursuant to an order of the Second District Court for the parish of Orleans, made in the succession of said F. Lacroix,

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which court had jurisdiction over the administration of said succession; and the defendants and appellants in this cause purchased the said claim and judgment in said suit, and paid the price of one thousand one hundred and fifteen dollars therefor in cash to said auctioneer. That afterward said purchasers took a rule upon the said Spear to compel him to make a *proces verbal* of said sale, and a rule was also taken by Mrs. Lacroix, one of the heirs of Francois Lacroix, to set aside said sale. That the rule on Spear was made absolute, and the rule to set aside the sale, taken by Mrs. Lacroix, was dismissed, which judgment upon said rules became final in March, 1879, and have not been appealed from or in any manner set aside, avoided or reversed, but still remain in full force and effect."

Without proceeding any further in this court, the case was remanded to the court *a qua* for the administration of proof on the issues thus raised, so that we might be able to act upon it in determining the question before us, viz.: the dismissal of the appeal *vel non*.

While the question of the appellant's title to the judgment appealed from, and of its avails, has been much discussed by counsel on either side in their briefs, and that question was gone into in the evidence that was adduced, it strikes our minds that it can not be determined now, and that no judgment we could render thereon would operate as *res adjudicata* between the parties.

But we think it clearly appears as well by the proof administered as by appellant's judicial admissions, that the judicial proceedings and sale, whether valid or illegal, have the effect of an acquiescence in the judgment, which must result in the dismissal of the present appeal.

But judgment dismissing the appeal can not, in any manner, affect the rights of appellants as adjudicatees at the auction sale. They are fully reserved.

Appeal dismissed.

ON APPLICATION FOR REHEARING.

Counsel for appellants suggest that the reservation, as suggested in our opinion, should be embodied in the decree. To this there is no objection, and we will supplement our decree accordingly as follows, viz.:

It is therefore ordered and decreed that, as appears from the

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record and proceedings herein, the appellants have become adjudicatees of the judgment appealed from, and this operates as such an acquiescence therein as to necessitate the dismissal of the appeal, the dismissal of the appeal shall be without prejudice to their rights as adjudicatees, which are fully reserved.

It is further ordered that, as thus amended, our former decree remain undisturbed.

No. 11,820.

NEW ORLEANS ELEVATOR COMPANY VS. CITY OF NEW ORLEANS.

When the object and purposes of a suit is to annul an award of arbitrators, the burden is on plaintiff to demonstrate its incorrectness in point of fact, and, failing to discharge it, the attack must fail and the award left in full force.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Frank N. Butler for Plaintiff, Appellant.

E. A. O'Sullivan, City Attorney, for Defendant, Appellee.

Argued and submitted June 5, 1895.

Opinion handed down June 21, 1895.

The opinion of the court was delivered by

WATKINS, J. Alleging itself to be a corporation organized under and by virtue of a law of this State, for the purpose of erecting and operating grain elevators, warehouses, etc., for the storage of grain and other commodities, with authority to erect one or more wharves, grain and flour elevators, etc., upon property it had acquired upon the front of the Mississippi, they institute suit against the city upon the following grounds, viz.:

That subsequent to its organization the council of the city granted it permission to build a wharf equal to any then existing in the city, which was to occupy 276 feet of the river bank, and to build into the river to a sufficient distance to be in twenty feet of water at a low stage; said wharf to be built and kept in repair at the expense of the company, and under the supervision of the city surveyor.

That by the fourth section of the ordinance which granted the aforesaid permission, it was among other things provided that when the company should discontinue its operations, the said wharf should revert to the city at a valuation to be fixed by two disinterested parties, one to be appointed by the city and the other to be selected by the company; and in the event of a disagreement between them as to the proper valuation to be placed upon the wharf, an umpire should be appointed by one of the Civil District Courts of the parish of Orleans.

That subsequently the City Council extended the privileges of the corporation for a period of ten years, by an ordinance adopted on the 6th of September, 1883, so as to provide that both the wharves and the mooring posts, etc., should revert to the city, at a valuation to be fixed as before indicated.

That shortly before the termination of its franchise the company gave due notice to the mayor of the city to that effect, and that it had selected and appointed its representative for the purpose of assisting in making an appraisement such as the city ordinances contemplated, and that he would be prepared to act as soon as he was advised by him that he had appointed an appraiser to act on the part of the city.

That the mayor was tardy in giving attention to the matter, and only made the selection of an appraiser several months afterward, and when appointed, the two appraisers failed to agree as to the proper valuation to be placed upon the company's wharves, mooring posts, etc., the appraiser appointed for the city declaring that the wharf and appurtenances were of no commercial value to the city. That the court appointed an umpire, who, after a superficial examination of the wharf, made a report to the effect that on account of long service the wharf had become practically useless for commercial purposes, thus aligning his report with that of the appraiser selected by the mayor.

That after filing a formal protest with the mayor, the company instituted this suit, praying for judgment annulling and revoking the report of the arbitrators, and condemning the city to pay it the sum of two thousand two hundred dollars as the value of the wharves, etc.

The defences raised in the answer are, (1) no cause of action, on the ground that there is nothing in the law or in the agreement between the parties which makes it obligatory on the city to accept or

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receive the reversion of the company's wharves, etc.; (2) that under the terms of the city ordinance which the plaintiff invokes, it had contracted and agreed that it would build for the city one thousand five hundred dollars' worth of intersection paving, with which contract the company failed to comply altogether. On that score the city prays for judgment accordingly.

On the trial there was judgment in favor of the defendant, rejecting the plaintiff's demands, and the latter appealed.

The written report of the umpire, at which this suit is chiefly directed, is annexed to the plaintiffs' petition for reference; and as it is the succinct embodiment of the facts upon which defendant relies, we will state its purport, which is as follows, viz.:

That, having met the two arbitrators and heard their respective statements with reference to the valuation of the company's wharf, etc., he accompanied them to the *locus in quo* and with them made a careful examination of the wharves and mooring posts, and found that, in his judgment, "from long service and want of repair, they had become utterly useless for any commercial purpose. The piles upon which they had been erected (were), with a few exceptions, rotten; and the cribbing (had) in many places been strengthened, when found wanting, with pieces of light timber. In fact, the wharves seem to have been kept up, in view of its reversion to the city, at the smallest expense to the company; and by want of care and repair has become of no value whatever.

"That, for the greater part, the mooring posts were of no value or use, unless taken in connection with the worthless wharf to which they are attached; and, in the reconstruction of the wharf, it will be necessary to remove them, thereby creating an expense instead of a benefit to the city," etc.

"That the cluster-piles, the only ones which can be considered of any value, are far within the river line of the new wharf which is to be erected at that point, and (that in its construction) they, as well as the others, will have to be removed, and will therefore be of no value to the city," etc.

That "the lumber or material used in the construction of the wharf * * * is of no value at present, and as may be seen," etc.

With some additional elaboration of statement which is needless to detail, he closed and signed his report.

On the part of the plaintiff the company's expert was introduced

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as its principal witness, and his statement, in his own words, is that "the wharf was in such condition that the Elevator Company could do business on it. It was not a new wharf. We found some timbers which were slightly rotten on the outside, but inside they were all sound. I found the piles in good condition. I think the wharf was worth about one half the cost of a new wharf," etc.

One of the company's employees, a weigher, supports the statement of the expert, in a general way. Three or four witnesses made similar statements, but their information was chiefly derived from casual observation. The secretary of the company testifies to the general good condition of the wharves, stating that after repairs had been made "it was in perfect order." And that when once in good order it so remains for about ten years.

On the part of the defendant, the mayor's expert was introduced as a witness and made a statement of facts corresponding with the umpire's report, and affirming the utter worthlessness and rottenness of the wharf," etc. In fine his statement is that he "considered the wharf of no commercial value to the city, on account of the general condition of the lumber and the way it was put up."

In speaking of the interview and discussion which took place between himself and the expert of the company, he stated most positively and unqualifiedly that the latter had offered him a bribe of five hundred dollars if he (the witness) would join him in making a report favorable to the company.

He repeated the statement, and said:

Q. There is no mistake about the fact that the offer was made?

A. No, sir; it was an unqualified proposition to give me five hundred dollars if I would consent to make that report.

Q. Of course you did not accept the offer?

A. No.

The testimony of the umpire was taken, and its purport is the same as his report.

The testimony of one of the wharf lessees and of the city engineer was taken, and it is of the same tenor.

In rebuttal the plaintiff introduced three witnesses, but the company's appraiser did not take the stand or deny the damaging charge which the defendant's appraiser made against him.

From the reasons assigned by the judge *a quo* for this ruling, it appears that he rested his judgment exclusively upon the fact that

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the company's expert had offered a bribe to defendant's appraiser to induce him "to concur in a corrupt and false appraisement."

No doubt that this circumstance was entitled to great weight in making an estimate of that witness' testimony, but it should not have exercised any further influence upon the decision of the plaintiffs' case.

But upon other grounds entirely independent of the testimony of that expert, we are of opinion that the judge *a quo* correctly decided the case in favor of the defendant, and the chief reason for this statement is that the great preponderance of the evidence is on the side of the defence.

Judgment affirmed.

NICHOLLS, C. J., absent.

No. 11,849.

SUCCESSION OF E. R. BEEMAN ON APPLICATION TO HOMOLOGATE THE FIRST PROVISIONAL ACCOUNT.

The account filed is not final.

The account of the proceeds of the crop of 1890 was apparently correct. If not correct, and other amounts, it should be hereafter ascertained, are due, it may be charged on the final account.

Without an order of court the executor, although an order had been issued to sell the property to pay debts, during the year 1891 cultivated the place, although held under a lease (without attempting to dispose of the lease or obtaining order of court to continue it).

He was properly charged with the rental value of the place, as fixed in the contract of lease. The admitted value of the use of the agricultural implements was properly charged to the executor. The price at which they sold by public auction must be added to his indebtedness, and not the inventoried value.

The judgment properly charged for the use of the mules and the price; from this is deducted the small item for forage fed to the mules. The executor who fails to prove why he did not collect a twelve months' bond is responsible for the amount of the bond. An executor who does not compel an adjudicatee to comply with his bid (without good reason) is properly charged with the amount of the bid.

The executor can not question the correctness of his own approval of a claim against a succession, unless there was manifest error.

Payments made by an executor without an order of court are subject to the closest scrutiny and should not be allowed unless manifestly correct.

A PPEAL from the Seventh Judicial District Court for the Parish of East Carroll. *Montgomery, J.*

Succession of Beeman.

Joseph E. Ransdell for Plaintiff, Appellant, cites: 35 An. 858; 32 An. 134; 37 An. 3; 40 An. 620, 484; 39 An. 696; 38 An. 611; 33 An. 344; C. C. 3228, 1163, 1164, 1165, 1668, 1670.

Charles S. Wyly for Opponents, Appellees, cites: 12 An. 539; 35 An. 915; 8 M. 135; 32 An. 133; 39 An. 696.

Submitted on briefs June 12, 1895.

Opinion handed down June 17, 1895.

Opinion refusing rehearing June 29, 1895.

APPLICATION TO HOMOLOGATE AN ACCOUNT OF THE EXECUTOR.

The opinion of the court was delivered by

BREAUX, J. The executor took charge of the succession of E. R. Beeman in September, 1890. The property was movable. It was appraised at six thousand seven hundred and ninety-nine dollars and one cent, and consisted of a growing crop on the Erie plantation (of which he, the late E. R. Beeman, had a lease dating from January, 1889, to the year 1894); of accounts due by tenants, together with live stock and farming implements.

He also had a stock of merchandise in the plantation store.

After the executor had qualified, he carried on the plantation and the store until early in 1892, although an order was granted to sell the property to pay debts on March 19, 1891.

He shipped the cotton of 1890 to the firm of the late E. R. Beeman to whom the succession was indebted for advances on the crop of 1890 in the sum of one thousand eight hundred and seventy-four dollars and fifty cents.

The executor's account was filed in August, 1892. A number of the creditors opposed the account on the grounds chiefly, that the item of six thousand three hundred and twelve dollars and eighty-five cents, "proceeds of crop of 1890, including rents, wages, crop and accounts," is merely the credit side of the account current of the commission merchant; that no showing is made of the number of bales, of wages, crop made, number received from sub-tenants.

They also claim that the executor is not charged with rent, in an amount sufficient.

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They itemized their claim as follows:

Rent of Erie plantation for 1891	\$2,275 00
Insurance on gin and store	210 00
Rent of twenty-four head of stock, \$25	600 00
Total	\$3,085 00

They also seek to hold him responsible for certain items of the inventory.

One of the opponents, Milliken, alleges that a larger amount is due him than was allowed in the judgment.

The other opponents urge similar grounds of complaint.

There were other grounds of opposition. We passed them without noting them, for the reason that they are not included in the answer of opponents to the appeal, and those not granted by the judge of the lower court in the judgment are presumed abandoned.

The judge of the lower court, after having amended the account, rendered judgment, approving it as amended.

The amount for the crop of 1891 remained fixed, as already stated. The charges against the succession for expenses of cultivating the crop that year were stricken from the account.

From the judgment the executor prosecutes this appeal, and here prays that the judgment be amended; first, by striking out of his account the items of two thousand three hundred and eighty-three dollars and twenty-three cents charged against him for proceeds of crop of 1891, and that instead he be charged with the sum of one thousand six hundred and twenty-five dollars, rental value of Erie in 1891, instead of two thousand four hundred and eighty-five dollars, as fixed by the court.

Second. By striking out the item of five hundred and seventy-five dollars, charged to him by the court for rent of mules, and charging him in lieu with the inventoried value of the mules, or in the alternative, by reducing that sum to three hundred and thirty dollars.

Third. By withholding final judgment against him for the price of personal property sold on twelve months' credit and proceeds of property unlawfully withheld by adjudicatees.

Fourth. By rejecting the claim of the opponent Milliken for five hundred and thirty-five dollars and forty-eight cents for rent, at eight per cent. from November 1, 1889, or in the alternative, by reducing it to five hundred and twenty-nine dollars, without interest.

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Fifth. By setting aside that portion of the judgment which gives to this opponent a vendor's privilege on the proceeds of sale of three mules, to secure the payment of three notes, aggregating two hundred and fifty-five dollars and fifty cents in principal.

Sixth. By deducting from the charges on his account (executor's) the sum of one hundred and thirty-five dollars for the price of a mule entered in error.

Seventh. Relates to farming implements and a lot of hay of little value.

With reference to the first item of six thousand three hundred and twelve dollars and eighty-five cents, proceeds of crop of 1890, the executor supports it by testimony that he shipped the crop to the usual market, and that it was sold at its value by the commission merchant who had made the advances. It was properly charged against the executor, and has every appearance of being correct.

The opponents urge that it makes no showing of the yield of the wages, crop of fifty-seven acres and the price received therefor; no showing as to the amounts paid by the individual tenants for land, rent, hire of mules, wagons and implements.

The account is not a final account of administration. Gross errors and incorrect entries can be corrected in the final settlement. Nothing of the kind appears at this time, and we therefore agree with the District Court in approving that item.

The rent of Erie plantation for 1891 is the next ground of opposition. We have already stated that the executor contends it should be much less.

The judge of the lower court fixed it a total two thousand four hundred and eighty-five dollars.

This was the consideration (including insurance) of the lease to which we have before referred.

The executor, without judicial authority, assumed the responsibility of operating the leased plantation during the year 1891. He must be charged with the amount at which the place was leased.

The executor sought to prove by the expert testimony of witnesses that the rental value of the place was considerably less.

The testimony was given several years after the date of the contract of lease. The lease suggests more certainty as to value than mere estimates. Tutorship of the Minors Hollingsworth, 45 An. 134, 142.

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The executor could have avoided the payment of this amount by complying with the court's order and selling the property, if there was no possibility of obtaining legal sanction to operate the place for account of the succession.

The opponents, as another ground of opposition to the account, contend that the executor should be charged with the amount of the open accounts carried in the inventory and other items thereon aggregating seven thousand and sixteen dollars and seventy-nine cents.

This is more than the total of property inventoried. The inventory shows the following property appraised as follows:

Merchandise in store.....	\$1,599 05
Farming implements.....	872 90
Live stock	1,940 00
Open accounts	1,865 81
Wages crop.....	840 00
Bagging and ties.....	97 25
Cash on hand	84 00
Total.....	\$6,799 01

In the judgment of the lower court these different amounts are charged, save those that were properly used and accounted for by the executor.

The charges against the succession for expenses of cultivating the crop of 1891 was stricken from the account. In J. S. Milliken's answer to the appeal he claims a balance of two hundred and sixty-nine dollars and thirty-four cents, with interest due on rent of 1892.

The judge of the District Court held that this claim for rent was extinguished by rents collected by this creditor from the tenants that year, rents of lands cultivated by him, and other claims due the succession upon which he realized. The difference is not considerable and the evidence would not support an amendment allowing the balance.

The opponents claim that the executor should be charged with the difference between the price at which he bought cotton in 1890 from the tenants in settling with them and the price for which it sold in the market. They invoke the correct principle that an executor should not by his contract involve the succession in debts.

But the rule does not apply here for the reason that opponents admit that where rents are payable in cotton he had authority to receive payment in cotton.

The objection is that he could not accept it at a loss in settlement of money, rents and money accounts.

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In the absence of proof, we will not assume that there was negligence or bad faith in these transactions, which resulted in the loss of small amounts.

The fluctuations of the cotton market are such at times that the most intelligent and careful incur losses.

The executor and appellant urges a number of grounds of error in the judgment from which he appeals.

In deciding questions raised by the opposition we passed upon the executor's first ground of objection to the judgment, and held that the rent for 1891 was correctly fixed by the court.

The second ground urged by the executor is to the item of five hundred and seventy-five dollars, allowed by the District Court for mule rent in 1891.

He claims that he should be charged with the inventoried value of the mules and not with rent.

They sold for one thousand seven hundred and fifty-eight dollars, by public auction, for account of the succession.

The rent earned for their work on the day of sale at the rate it is customary to charge tenants was five hundred and seventy-five dollars. It was the customary price for mules rented to tenants on plantations in 1891.

We do not feel justified to amend the judgment and substitute the inventoried value of the mules to the price for which they sold and their rent value while in the executor's service prior to the sale.

The third of the executor's grounds against the correctness of the judgment is that he is charged with the proceeds of property sold on twelve months' credit, and proceeds of purchase price of property unlawfully held by several adjudicatees, at the sale, until the decision on the final account.

The sale was made in August, 1892. The twelve months' bond matured long since, and should have been collected.

In default of collection, and in the absence of any evidence of an attempt to collect, it was proper to charge the executor with the amount of these bonds. The settlement of successions should not be indefinitely postponed. To prevent objectionable delays, claims due should be collected, or the executor prepared to prove, when necessary, that he is in no respect responsible for the failure to collect.

With reference to the amounts of bids unlawfully withheld by certain adjudicatees.

The executor has his remedy and can not shield himself from settlement and the payment of these amounts by a mere assertion that certain bidders did not choose to comply with their bids. The defence is groundless. Acts of indulgence cease to be commendable when one is acting in a representative capacity.

The executor also objects to the amount allowed J. S. Milliken in the judgment on the ground that it has been paid in full, and that his endorsed approval in the claim was made by him in error.

This objection was made the first time during the trial, when the claim was offered in evidence. It was not preceded by any amendment of the judgment, or the least suggestion that the claim was approved in error.

We have examined voucher numbered one hundred and eight, for five hundred and fifty-four dollars and eighty-six cents. With the executor's approval, it has every appearance of being correct, and, in any event, if there was error in the approval, it should have been pleaded before urging an objection on the ground of error.

There is a slight difference in the addition in matter of this claim.

The difference amounts to five dollars and sixty-two cents. Unexplained, we think the rule *de minimis* applies.

The executor urges that the judgment charges him with the full inventoried value of the farming implements, instead of what they sold for, while it charged him with what the mules sold for, *plus* a rental for the year 1891, and for the amount brought by the merchandise at the sale.

In other words he complains that the implements are worth appraised value; mules are worth rental for one year and selling price; merchandise is worth selling price, and that each mode is the most unfavorable to the executor.

As it is not in proof that these implements had deteriorated in value; that they were not in good condition, owing to their use by the executor in 1891, or that there were any missing, our decree will amend the judgment of homologation by deducting the difference between the inventoried value and the sale.

Another ground of objection of the executor is that the judgment charges him with a sum of one hundred and thirty-five dollars, which, he contends, should not be charged.

It is carried in his account as an amount collected in cash.

He sought to amend his account by alleging that it was error, that

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the amount had been collected in cotton, and that the cotton was sold for account of the succession, with which he had already charged himself as executor, as part of the item of six thousand three hundred and twelve dollars and eighty-five cents.

The testimony upon that point has not satisfied us of the court's error.

The last utterance of the witness is:

"I collected one hundred and thirty-five dollars for one mule, which is charged to me in my account."

It may be that this should be read with another answer, that it was collected in cotton, and it would be thus read if the item were supported by the books kept for the executor.

The executor admits that the farming implements were worth the sum of fifty dollars. The amount is due, the value being admitted, and rent value of other property having been charged for personal use by the executor in 1891.

A small item of hay feed to the mules will be deducted, viz.: thirty-five dollars. There was no error in leaving the question of commission to be determined in homologation of the final account. The executor, upon final and satisfactory settlement, will be entitled to his commission.

It is therefore ordered, adjudged and decreed that the following item of the judgment be amended: "And also with the inventoried value of the farming implements, to-wit: the sum of three hundred and seventy-two dollars and ninety cents," by reducing that amount (1) to one hundred and eighty-two dollars (the price of these implements at public sale). The account is further amended by deducting (2) thirty-five dollars from that item: value of hay included with articles of agricultural implements in the inventory, leaving on that item and of the sum first mentioned one hundred and fifty-five dollars and ninety cents.

The judgment is further amended by adding fifty dollars to the debit side of the executor's account, and increasing thereby the amount of his indebtedness on the implements by the sum of fifty dollars, making total thereon two hundred and five dollars and ninety cents.

As amended, the account appealed from is affirmed at appellee's costs.

NICHOLLS, C. J., absent.

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ON APPLICATION FOR A REHEARING.

The executor is charged with two thousand four hundred and eighty-five dollars and five hundred and seventy-five dollars for land and mule rent for the year 1891, of which charge he complains.

From his charges against the succession are deducted the expenses of cultivating the crop that year.

Owing to motions to strike out and amendments, and the issues as presented, we understand that it was not the intention to hold the executor bound for the proceeds of the crop of 1891, and at the same time charge him for land and mule rent.

The former.....	\$2,485
The latter.....	575

We would at once set this matter at rest and order that the amount of two thousand three hundred and eighty-three dollars and twenty-three cents be not charged, being the proceeds of the crop of 1891. The opponents not having been heard, we prefer to remit the question to be determined on the next account. The opponents will then have the opportunity of tendering such defence as they may have against deducting the proceeds of the crop of 1891.

With reference to the twelve months' bond the executor applies to postpone settlement until his next account.

These bonds bear date August, 1892. The evidence in the case was taken in March, 1895.

We do not understand that they had been paid at that date. The delay in making the collection not having been explained, we affirmed the judgment in this respect.

The executor complains of the interest of eight per cent. allowed on an amount of five hundred and thirty-five dollars and forty-eight cents from the first day of November, 1889, on the ground that it can not be considered as conventional; no interest having been stipulated.

If this be the fact interest is due at five per cent.

Another objection is interposed by the executor.

A vendor's privilege is allowed on the proceeds of three mules to secure the payment of two hundred and twenty-five dollars.

It is therefore ordered, adjudged and decreed that our prior decree remain unchanged, save and except as to the item of two thousand three hundred and eighty-three dollars and twenty-three cents; vendor's privilege allowed on the proceeds of three mules, viz., two

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hundred and twenty-five dollars, and interest on five hundred and thirty-five dollars and forty-eight cents. As to these three items, the first, viz., two thousand three hundred and eighty-three dollars and twenty-three cents is to be deducted; the vendor's privilege disallowed for the recovery of two hundred and twenty-five dollars (which is then to be treated as an ordinary claim), and interest reduced to five per cent. from date of acknowledgment, unless opponents established error as to these items.

The right of the executor to sustain these reductions when the next account will be filed, and the right of the opponents to question correctness and legality of these items, is also reserved.

The judgment of the District Court is amended so as to conform with this reservation.

Our original decree as amended by this decree is affirmed.

Rehearing refused.

No. 11,769.

EXECUTORS OF D. R. CARROLL VS. THOMAS W. CASTLEMAN AND WIFE.

The plaintiffs, executors, seek to collect a judgment obtained by the testator when he was the head and master of the community.

After the death of the wife and the dissolution of the community an inventory was made and he became the administrator of her succession.

Subsequently he sold his interest in the judgment.

The two successions were solvent and the heirs of age.

There is no question of *legitime*.

The executors seek to enforce a judgment in its entirety, although the head and master of the community, after the dissolution of the community, transferred his interest.

The executors attack the transfer.

Under the circumstances of the case it was not the duty of the executors to sue to change the character of the transfer; from a transfer of the judgment, to the payment of the judgment by the judgment debtor.

If there are rights as to that interest it must be asserted by the heirs.

With reference to the remaining interest undisposed of by the husband and which by acceptance of the community by the heirs in their property—

It was in possession of the executors, and it was their duty to collect the remaining interest.

It would serve no useful purpose to stop the execution of the judgment and order that it be sold by licitation to effect a partition.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Clegg & Thorpe for Plaintiffs, Appellants.

Carroll & Carroll for Defendants, Appellees.

Argued and submitted June 4, 1895.

Opinion handed down June 21, 1895.

Rehearing refused June 29, 1895.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs sue to execute a judgment rendered in favor of D. R. Carroll, against the defendant Castleman, during the existence of the community, with his wife, who died some time prior to the death of D. R. Carroll, her husband.

The latter had qualified as administrator of his wife's succession in Division "A" of the Civil District Court. There was a judgment putting her heirs in possession of the property.

Subsequently, with the consent of all parties concerned, this judgment was annulled, and the succession declared open.

Nearly all the property on the inventory of the succession of D. R. Carroll had been previously described in the inventory of the succession of his wife.

The succession of D. R. Carroll was opened in Division "E," and his executors qualified.

They subsequently petitioned the court in which the succession of Mrs. Carroll had been opened to transfer the proceedings in her succession, and consolidate them with the proceedings of the husband's succession.

The order prayed for was granted by the judge of Division "A."

No action was taken in regard to the consolidation (applied for by the executors) by the judge of Division "E."

With reference to the judgment the plaintiffs seek to execute, they allege that the heirs of Mrs. Carroll have accepted the succession with benefit of inventory; that the judgment was in his possession and under his administration at the date of his death, and that, as his executors, they are the holders and owners of the judgment, duly and timely recorded. They urge that defendant's wife, who is one of the heirs of Mr. and Mrs. D. R. Carroll, never bought

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the interest of the former (D. R. Carroll) in the judgment, but that if he parted with his interest he sold it to the husband, Thos. W. Castleman, and that to the extent of the interest (sold on the face of the papers) the judgment was paid.

That the judgment operates a judicial mortgage on the property of the debtor, who, it is alleged, is insolvent, and that property in the name of Mrs. Castleman was really the property of her husband, and subject to their judicial mortgage.

The defendants interposed an exception to plaintiffs' petition upon a number of grounds. The first is that the executors are without authority to stand in judgment. That the late D. R. Carroll had parted with his interest in the judgment.

The facts are, as disclosed by the record, the late D. R. Carroll sold all his interest, as alleged, in the judgment to his daughter, Mrs. Castleman.

That subsequently the court recognized the transfer and decreed that she was subrogated to her father's interest in the judgment against her husband.

The plaintiffs caused a writ of *fi. fa.* to issue on the judgment thus transferred.

The second ground of exception is that the property has passed out of the succession of D. R. Carroll, and that it is in the possession of the heirs, the latter having filed proceedings for a partition of the property of the estate.

The admitted facts upon this point are, that there is a suit pending for a partition of the property of the two successions; that it was filed several months prior to the present proceeding, and that no order has been rendered, save one authorizing the sale of real estate.

The ground is that the judgment in question is not in the possession of plaintiffs, and that Mrs. Castleman, owner of the interest of the late D. R. Carroll, has sued for a partition of the judgment.

The facts are that plaintiff's suit was brought in January, and that this action for a partition of the judgment was instituted some time after.

It is also admitted that the successions are solvent, and that the succession of Mrs. Carroll owes no debts.

Finally it is excepted that the persons claiming interest are not before the court, and finally, that plaintiffs having caused a writ of

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feri facias to issue in the proceedings which recognized Mrs. Castleman as transferee, plaintiffs are estopped from claiming that she is not the transferee.

The first question for decision is whether the executors of a will can maintain an action to annul a sale in so far as relates to the one the vendor declared, in the deed, was his vendee, *i. e.*, that the transfer, alleged by the defendant, to the daughter was in reality a payment by the son-in-law, the judgment debtor.

There are no creditors and no absent heirs, nor is there any issue regarding the disposable portion.

The executors are, therefore, entrusted with the duty of executing the will of the testator. Upon the face of the papers, the interest of the judgment creditor had passed to his vendee some time prior to his death. In so far as relates to that interest it is not incumbent upon the executors, in the presence of the heirs of age, to institute an action to set aside the sale or change its terms and conditions.

If the prayer of plaintiff's petition were granted, it would not have the effect of restoring the interest of the late D. R. Carroll to his succession.

If any advantage is to be gained by changing the character of the act in question from a transfer of the judgment to Mrs. Castleman to a transfer to Thomas W. Castleman, it is not made manifest by the petition.

In so far as relates to the executors, there is a negative to any possible advantage to the succession, from the fact that they caused a *fi. fa.* to issue from the judgment, after the recognition by an order of court of the transfer of the interest of D. R. Carroll.

In *Woodward vs. Thomas et al.*, 38 An. 238, 243, the jurisprudence upon this point was reviewed. The court said: "This implies the right and duty to recover the property, as much as to collect the debts of the succession. Otherwise he can not settle its affairs and ascertain the surplus. It is not for him, it is true, to assail the validity of acts done by the decedent, unless necessary for the protection of creditors, and if he have already settled all the debts and charges of the succession, it is improper for him to institute new actions, because the objects of his agency have been fulfilled, and he should give way to the heirs, who are the only persons interested, and may assert their own rights."

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Under the circumstances of this case, we think the executors had no right to stand in judgment, and that to the extent of the interest of D. R. Carroll the suit was properly dismissed.

This brings us to a consideration of the interest in the judgment which the late Mr. Carroll did not transfer, i. e., the interest in the community to which these heirs have a right by inheritance from their mother, Mrs. D. R. Carroll.

This interest in the judgment must remain, under the law, in the succession, until the heirs have accepted and have possession of the assets.

It was in the possession of D. R. Carroll, administrator, at the time of his death, and the executors, with seizin, have succeeded to his possession.

Great stress is laid by the defendants upon the fact that one of the heirs sues for a partition, and that the heirs have answered, and do not particularly object to a partition. There are heirs who have filed no answers; others who consent conditionally to a partition, and deny that the plaintiffs who sue for a partition have possession.

The fact remains that no application was made for a partition of the judgment in controversy, prior to the institution of plaintiffs' suit.

There was a suit brought for a partition of that judgment, entered subsequent. It was clearly irrelevant and inadmissible. Moreover, it could not bind the defendants in partition who have filed no appearance.

The executors not having been discharged, and being in possession of the judgment, it is their duty to enforce the collection of the judgment.

Even regarding promissory notes this court held, in *Holliday vs. Holliday et al.*, 38 An. 175, 176, that the executor should collect them, and rejected a demand for a partition in kind or by sale.

In *Rochereau vs. Maignan*, 32 An. 45, it was held that where several heirs of a succession were owners in indivision of a judgment, partition by sale will not be ordered on the application of one of the owners, opposed by the others, when no effort has been made to execute the judgment.

Here an effort is being made to execute the judgment for the purpose of dividing the amount which may be collected, a more expeditious and less expensive method of settling the succession in so far as relates to this judgment.

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Not long since this court said: "Not only is it entirely proper and right that the succession of the husband should embrace that of his deceased partner in community, but two distinct and separate administrations are unnecessary and would occasion increased expense and litigation." Succession of Lamm, 40 An. 315.

That authority is particularly applicable here. It is true that the survivor in community had parted with his interest. But he could not transfer the remainder due on the judgment to which the heirs had a right by inheritance. It remained none the less in his possession and subsequently in that of his executors.

"Il va sans dire que le mari peut pas renoncer a la communauté. C'est lui qui administre et qui contracte les dettes dont la communauté se trouve chargée; concoit-on qu'il s'affranchisse du lien obligations qu'il a consenties en repudiant ce qu'il a fait lui-même? On comprend que la femme est etrangere aux dettes du mari, tandis que le mari en est le debiteur personnel." Laurent, Vol. 22, p. 382.

The husband being indebted (*le debiteur personnel*), in so far as relates to this community, *a fortiori* it was proper for the executor to collect the remainder due on a judgment in possession of the succession in order to turn it over to the heirs to be divided.

The husband, debtor of the remaining interest in the community, might have taken conservatory steps in matter of the judgment.

The executors who were in possession were also authorized to take such steps. The opposition of one of the heirs to the collection of the judgment is not sustained when considered in light of authority.

It is ordered, adjudged and decreed that the judgment appealed from be maintained as to the interest of D. R. Carroll in the judgment obtained by him against Thomas W. Castleman, and the action is dismissed as to that interest.

It is ordered and decreed that the judgment is annulled, avoided and reversed in so far as it dismissed plaintiff's action to recover that part of the judgment not transferred by D. R. Carroll to Mrs. Thomas W. Castleman, and that executors have authority to continue the proceeding for the collection of the interest last mentioned.

The case is remanded for trial contradictorily between plaintiffs and defendants as relates to the interest in the judgment in question not transferred by D. R. Carroll.

As amended the judgment is affirmed at appellee's costs.

NICHOLLS, C. J., absent.

Ricon vs. Hart.]

No. 11,844.

J. RICON vs. A. HART.

The plaintiff sued to recover rent claimed by him.

The remedy to eject lessees is summary.

A rule of court designating certain days to try civil jury cases does not necessarily exclude all possibility of hearing a summary case, particularly if it does not interfere with the trial of the civil jury cases, and the defendant's cause is not thereby prejudiced by being compelled to go into trial unprepared.

The delay to be expressed in the citation to vacate leased premises (or the notice) consists of three days, to be counted from the date the citation or notice has been served.

The lessee is bound to pay the rent at the terms agreed on.

The want or failure of the plaintiff to put *in mora* is a ground of exception.

The taxes (part consideration of the lease) not having been paid, and the time for the payment, without penalty having passed, the lessee, from that fact, was in default.

A PPEAL from the First Judicial Court for the Parish of Caddo.
Land, J.

Alexander & Blanchard for Plaintiff, Appellee.

A. H. Leonard and *F. G. Thatcher* for Defendant, Appellant.

Argued and submitted June 10, 1895.

Opinion handed down June 21, 1895.

The opinion of the court was delivered by

BREAUX, J. This is an action to eject the lessee from the property leased to him by the plaintiff.

The latter leased the Hart Island plantation to the former on the 2d day of February, 1894, for the term of fifteen years.

The consideration of the lease was the sum of twenty-seven hundred dollars, payable on the 1st day of September of each year, and the payment of the taxes on the property each year. The taxes for 1894 amounted to six hundred and twenty-eight dollars.

The defendant testified that he was informed by the sheriff that for a week after January 1 it is not customary to enforce penalties in the collection of taxes.

In September, 1894, the lessee having failed to pay anything, the

lessor transferred his claim for the money sent (the rent for the first year's lease) to W. B. Ogilvie, and subrogated the transferee to his right as lessor.

Ogilvie, to whom the defendant owed a large amount for advances on his crop, in addition to the rent transferred to him, brought suit against the defendant, and had his crops, mules, farming implements and all his other property on the plantation under writs of sequestration and provisional seizure, taken possession of by the sheriff. The property was sold under an order of court, save the mules. They (the mules) were bonded and moved from the place by the surety on the bond.

This left the defendant without means to operate the plantation. He was attempting at the time of the suit to effect a sub-lease. The lessee not having paid the taxes on the 31st day of December, 1895, they were subsequently paid by the lessor.

On the 25th day of January, 1895, the plaintiff brought suit and alleged that his lessee had violated the lease and failed to comply with the terms of his contract, not having paid the rent.

The defendant excepted to the order of the court requiring him to answer within three days from service of the order to vacate and of the citation.

He claimed ten days, as in ordinary cases.

The defendant urges that the three days' notice of the statute has reference to the setting of the case for trial.

The Act 96 of 1888, amending R. S. 2155 and Act 96 of 1894, provides for fifteen days' notice to the lessee to remove.

At the end of fifteen days suit to eject may be brought. The delay for "ordinary proceedings" of ten days manifestly does not apply.

The Revised Statutes 2166 provides for trial after three days' notice.

The provisions of the statutes and the code of procedure was so interpreted by Matt's case, 37 An. 848; Citizens Bank case, 38 An. 500, and sustained the legality of the notice. The last act upon the subject (Act 96 of 1894), was adopted some time after the decision in Godchaux vs. Bauman, 44 An. 253, in which this court held that the three days' notice prior to judgment was legal and proper, and that a delay of ten days was not required. The Legislature did not deem it proper to extend the time to answer. That portion of the law regarding delay as interpreted by this court remained unamended.

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On the day of trial further time to answer was applied for and granted.

The defendant also excepted to a trial at the January term of the court, for the reason that, under the rules of the court, only jury cases could be tried at the time that the case was tried.

The rules of the court are that no civil cases, except jury cases, can be tried during certain designated days.

The act of 1855, and subsequent statutes, make this a very summary proceeding, and require it to be tried by preference.

Civil remedies are ordinary, executory and summary.

In the cases cited *supra*, it was held that the remedy to eject lessees is summary. In the last, the Citizens Bank case, 38 An. 500, it was decided that a prayer for citation did not have the legal effect of converting the process from the summary to the ordinary.

Under Code of Practice, 756, summary cases are decided on days fixed for their trial without delay, and conformable to such rules as the court may adopt.

The court *a qua* had no rule fixing days for the trial of summary cases. Although rules of court have the force of law, a rule excluding ordinary cases from trial during certain days does not necessarily apply to a summary case.

The contest is not for trial between a civil jury case and a summary case.

We understand that the court found time to do justice to both, without prejudice to any of defendant's rights.

The lessee, by the seizure and sale to pay the Ogilvie claim, was left without means to cultivate the place and pay the taxes.

It is true that the defendant had offered to sub-lease to a third person. It was a mere attempt.

Nothing definite had been concluded. The lessor's contract with the defendant did not leave the payment of the rent dependent upon such contingencies. The statute applying to "landlord and tenant" gives to the lessor the right, upon the termination of the lease, either by limitation or non-payment of the rent when due, or any other breach of the lease, to institute proceedings to eject the lessee.

The defendant had failed to pay the rent under circumstances which justified the plaintiff in seeking to resume possession of his property.

The taxes were due on the first of January. The days of grace

given by sheriffs, after the first of that month, to pay taxes, was a personal favor and an act of kindness and consideration, which were not part of the contract.

The defendant urges that the contract of lease was commutative; that if there was violation it was passive, and he was not placed *in mora*.

In his answer he alleges that plaintiff paid the taxes without having previously requested him to pay them. At this point of the case the testimony of the plaintiff and that of the defendant are somewhat conflicting.

The former supports the theory of his case, that he made all needful demand of payment; the latter denies that any demand was made.

The judge of the court below has decided that there was a sufficient placing in default. We have no reason to declare his decision incorrect and unsustained by the weight of the testimony.

Under the laws relative to landlord and tenant, prior to recent amendments, this court held:

"The judge of the court below has taken the correct view of the facts of the case, and we concur with him that in a case like this, it is not necessary to resort to a direct action to annul a lease, if there be one, the law having declared 'that the immediate consequence of the failure of the tenant to pay the rent when it becomes due is to vest in the landlord the right of expulsion.'" *Van Renselaer vs. Holbrook*, 1 An. 180.

The right to thus proceed is not restricted but enlarged by amendments adopted since the date of that decision.

We will not be understood as holding that a placing *in mora*, or its equivalent, is not necessary. Moreover, the plea of want of default was not made by the defendants. This case is exceptional. The taxes assumed as part of the consideration of the lease were due in September.

On the 31st day of December the tax debtor who has not paid his taxes becomes a delinquent.

The law provides "from the day the tax roll is filed in the mortgage office it shall be a lien on the property." Sec. 33 of Revenue Act of 1888.

There was a penalty due from the 31st day of December.

Without notice or demand the tax-payer is in default from that date.

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He owes the penalty, and the taxes are secured by mortgage on his property.

He places himself completely *in mora* by not paying the tax. The rights of the State in matter of the security and collection of taxes are well defined.

The plaintiff did not, as defendant argues, become his *negotiorum gestor* as to these taxes, after he had paid them. He was subrogated to the rights of the State and parish.

The syllabus in Succession of Will, 15 An. 881, correctly sets forth the principle announced in that case:

"When by the contract of lease the lessee undertakes to pay the taxes to be thereafter assessed on the property leased, if he fails to do so, the lessor having an interest as owner in discharging the debt, would, upon paying the same, become legally subrogated to the rights of the State or city against such lessee."

In the case of Beltran vs. Villere, 14 Southern Reporter, 506, 510, Opinion Book No. 61, p. 824, this court held that it was the duty of the mortgagor to notify his mortgagee of his inability to pay the taxes.

The principle applied here answers the objection of the defendant in so far as relates to default.

It is therefore ordered, adjudged and decreed that the judgment appealed from is affirmed at appellant's cost.

NICHOLLS, C. J., absent.

No. 11,855.

D. A. BREARD, JR., VS. CITIZENS BANK OF LOUISIANA ET AL.

The "calls" for contribution are legal.

The act 246 of 1853, authorizing the directors of the Citizens Bank to transfer or set apart a stated number of shares of stock as cash shares, did not have the effect *pro tanto* of discharging the mortgage indebtedness.

That act declares that the contribution due on the cash shares, comprising the capital stock, shall remain as heretofore, payable by each of the mortgage stockholders respectively.

The shareholder had not paid anything upon the shares; he was on the contrary indebted for them. The statute authorized the reduction of the number of shares of the mortgage shareholders, by converting certain shares to cash shares.

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The indebtedness of the mortgage shareholders remained the same, and he was required to pay the same "calls" as he would have had to pay if his shares had not been thus converted into cash shares.

The rule would not apply if the shareholder had paid his stock in full or in part.

A PPEAL from the Fifth Judicial District Court for the Parish of Ouachita. *Richardson, J.*

Stubbs & Russell for Plaintiff, Appellant.

Henry Denis (C. T. Madison and E. J. Lamkin, of Counsel), for Defendants, Appellees.

Argued and submitted June 13, 1895.

Opinion handed down June 21, 1895.

The opinion of the court was delivered by

BREAU, J. The Citizens Bank seeks to foreclose two mortgages executed by plaintiff's father in its favor, one executed on the 7th day of September, 1837, and the other on the 18th day of July, 1838, both to secure the payment of seven hundred and fifty shares and of thirty shares of the capital stock of that bank. There was a release by notarial act to the mortgages in 1837, upon a portion of the property originally described, as set forth in the petition for order of seizure and sale.

There is no difference regarding the amount save that plaintiff alleges in his petition for an injunction that twelve shares of stock were taken from his father by the bank and sold and the proceeds received by the bank.

It is urged by the plaintiff that the bank having taken these twelve shares of stock and disposed of them, he can not be compelled to pay for stock thus taken. The plaintiff admits that he and his co-heirs accepted the succession of the mortgagor on 30th of August, 1875. In the partition he received one-half of the land and his co-heir the other.

The other grounds of injunction are: That at most his property is mortgaged only to the extent of his virile shares in the succession of his ancestor, which is one-half.

We think it sufficient, upon this point, to state that the codal pro-

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visions of the law are, that a creditor holding a special mortgage can not be compelled to foreclose on one of two properties covered by the same mortgage for a portion of the mortgage indebtedness. Every part of the property is liable for the payment of the debt.

The second ground set forth in the injunction is that the mortgage had been transferred to Hope & Co.; that the State, by special legislative enactment, became the pledgee of the mortgage securities, and held these securities to secure the payment of the bonds.

That the charter of the bank was forfeited in 1842, and the State assumed control and liquidation of its affairs.

That by Act 100 of 1847 of the General Assembly, the bank was authorized to require such payments on the stock by its stockholders as would realize funds sufficient to meet the obligation of the State for and on account of the bank.

That in 1850 the directors adopted a resolution fixing the liability of each stockholder at seven dollars per share, payable in seven annual instalments of one dollar each, and that the State declared that the payment of the sum of seven dollars on each share would relieve the stockholders from any further liability on account of the bonds issued by the State in favor of the bank; that the amount having been paid, further contributions can not be required. The plaintiff invokes Act 100 of 1847 as having, in view of his compliance with its terms, operated a complete discharge. He pleads specially that all the acts of the Legislature in reference to the Citizens Bank, adopted since May, 1850, are laws impairing the obligation of contracts; that they are violative of the Constitution of the State and of the general government.

The court long since characterized the transfer of the securities granted by shareholders to the State as a species of pledge.

As a matter of fact the mortgages by which the shares were secured, as to their payment, were never actually handed to the State; they remained with the bank.

It is well known that the bank's existence dates from 1838, that the shares were fixed at one hundred dollars per share, secured by mortgage.

The advantage held out to the subscribers was the loan to which he was entitled and the number of his shares thus secured. It was designed that the aggregate of the mortgages should secure the cap-

ital, the bank was authorized to borrow to conduct the bank's affairs, pay the stock of the subscribers and the loans to the stockholders.

In order to facilitate the management of the bank in obtaining these loans the directors were authorized to issue bonds payable by equal portions in the course of a number of years. For the payment of these bonds the mortgages of the stockholders were to remain a pledge to the holders of the bonds, until the final liquidation of the affairs of the bank.

On the face of the bonds issued in 1835, the Citizens Bank acknowledges its indebtedness to the bearer for the sum of one thousand dollars, amount of each bond. The modes adopted did not at first prove successful; investors did not choose to lend their money upon the security offered.

In 1836 the faith of the State was pledged, and the amount desired was obtained. The form of the bond was changed from what it was under the prior act.

Upon its face the State of Louisiana acknowledged its indebtedness to the Citizens Bank for the amount of the bond.

For the guarantee of the bond thus issued, and for which the State had pledged her faith, the securities granted were transferred to the State and the holders of the bonds. Thus the State became the transferee (together with the holders) of the bonds she had issued.

The court has heretofore decided that the fictitious tenure by the State of these bonds and securities was a species of pledge.

In subsequent decisions this court also decided that the mortgagors, who executed mortgages to the Citizens Bank are not released from the payment of the mortgages by any discharge which may have been granted by Hope & Co., the bondholders, to the banking department of the Citizens Bank, so that the relation of the State to the bonds, and that of the bondholder to the banking department, was not a defence which could avail the mortgagor as a debtor, as declared in the deed of mortgage to the bank. The capital of the bank consisted of the money raised, as already mentioned by the subscription to the bank of the stock, secured by mortgage.

It was in proof that "he," the mortgagor, "acknowledged himself by these presents to be justly indebted to the said bank in the sum of ———," it was not possible to hold that the mortgagor was not indebted to the bank, but that he was indebted to the pledgees of the bank.

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We return to enactment 100 of 1847, invoked by plaintiff. It authorized calls upon the stockholders. Plaintiff pleads that having paid the calls made under that act he has a right to immunity from further calls.

This court has decided that Act 100 of 1847 did not have the effect of relieving the stockholders of the Citizens Bank from all further contributions.

In that legislative act, in the different resolutions of the Board of Directors, there is no such limit to contributions as that pleaded by plaintiff.

We examined that point in the case of the Citizens Bank vs. Heirs of Gay, 47 An. 551, and gave it all the attention we could command. Our conclusion was that the act in question did not secure the shareholders from future calls.

The plaintiff has also interposed the plea of prescription.

The grounds upon which he bases that plea are similar to those pleaded in the case cited *supra*.

For the reasons assigned in that case prescription is not a bar to the recovery of defendant's claim.

The points heretofore decided here were submitted both in the brief and orally, without extended argument in their support, for the reason, counsel stated, of recent decisions of this court on similar issues.

While plaintiff's counsel did not abandon any of the grounds of the injunction he argued solely against the demand for contribution on twelve stock shares disposed of by the board of directors of the bank, under the authority of the Act 246 of 1853.

These twelve shares, if deducted, would reduce defendants' demand to the amount of two hundred and eighty-eight dollars. The plaintiff's insistence is that he should not be condemned to pay contributions on stock sold to another; that mortgages are only accessory to secure a debt or obligation, and if the principal obligation be discharged the security becomes inoperative. The whole argument is based upon the idea of a divestiture of title to property without compensation; the taking of property without process of law and a plain violation of the construction of the Constitution.

From plaintiff's premises the argument is unanswerable and conclusive. But his premises are not sustained. They receive no support from the facts as we understand them.

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The plaintiff overlooks that (different from the shares in other similar institutions) his shares are not paid-up shares. They represent an indebtedness of the shareholder to the bank, instead of a credit. It is not in proof that plaintiff or his ancestor paid these shares, or the amount borrowed, for which these shares secured by mortgage were deposited as security.

The law-making power in 1858, when this indebtedness was more clearly impressed upon the minds of the debtor, creditor, and of the members of the Legislature, and less prone to be influenced by sincere and honest, but none the less erroneous theories, enacted the "mortgage existing against the stockholders to secure the portion of the stock so set apart shall not be thereby considered as raised, and the contribution due on the same shall remain as heretofore, payable by each of them respectively."

The purpose, if we correctly appreciate the facts developed by the record, was not to lessen the payments on the shares due.

In other words, the amount of the indebtedness remained, and calls for payment were possible; only the number of shares was less to the extent of not more than one in fifteen.

In *Citizens Bank vs. Heirs of Gay*, 47 An. 551, it was argued recently that under Act 45 of 1878 a call was made only upon the mortgage stockholders.

That it was contrary to the rules of equality laid down in *Brown vs. Insurance Co.*, 3 An. 177.

It was urged that the cash stockholders should also contribute (that is the stockholders who have paid up in full their shares under the Act 246 of 1858).

We were not impressed by defendants' theory upon this point when it was presented in the cited case.

In the case under consideration the mortgage shareholder objects to these "calls," for reasons already mentioned, and thereby gives cause for inferring that the "calls" should be paid by the cash stockholders who have paid their shares in full.

At first we were impressed by the argument. Upon consideration it became manifest that the "cash shareholders" and "mortgage shareholders" are in reality words of identification; that the "calls" are made for the purpose of paying an indebtedness.

The case cited *supra*, *Brown vs. Insurance Company*, as sustaining a principle of equality, has no application.

Land and Mortgage Co. vs. Heirs of Williams.

The shareholder in the cited case had made payment of an amount upon his shares, and he was not a debtor to the company. He, therefore, had something to his credit on his shares. Here the shareholder has made no payment upon his shares other than amounts that went to the extinguishment of his indebtedness for money borrowed.

Under the state of facts here, the conclusion is inevitable. The judgment must be affirmed.

It is affirmed.

NICHOLLS, C. J., absent.

No. 11,852.

THE AMERICAN FREEHOLD LAND AND MORTGAGE COMPANY, OF LONDON, LIMITED, vs. THE HEIRS AND LEGAL REPRESENTATIVES OF J. B. WILLIAMS, DECEASED.

An appeal from an order of seizure and sale, and an injunction against it, having been argued and submitted to this court contemporaneously, and the injunction suit having been decided, this court will take notice of these proceedings, and *ex proprio motu*, abate the appeal.

A PPEAL from the Fifth Judicial District Court for the Parish of Morehouse *Potts, J.*

Bussey & Naff, John C. Pugh and H. R. Boyd for Plaintiff, Appellee.

E. T. Lamkin for Defendants, Appellants.

Newton & Hall for Third Opponents and Appellants.

Argued and submitted June 13, 1895.

Opinion handed down June 21, 1895.

The opinion of the court was delivered by

WATKINS, J. This is an appeal from an order of seizure and sale in foreclosure of a mortgage, hence the only question presented for consideration is was there sufficient evidence to authorize the *sale*?

Armistead vs. Railroad Co., Consolidated.

It is matter of which this court will take judicial notice, that the appellants have sued out an injunction against the order and the seizure thereunder since this appeal was obtained and prosecuted, involving the validity of the proceedings *in pais*—the injunction and appeal having been argued and submitted to this court simultaneously, and the injunction suit having been this day decided. To go back and decide the issues raised on the appeal would be too much like reasoning in a circle.

We think the purposes of justice would be best subserved by abating the appeal *ex proprio motu* at appellants' cost.

Appeal dismissed.

NICHOLLS, C. J., absent.

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No. 11,847.

W. W. ARMISTEAD VS. VICKSBURG, SHREVEPORT & PACIFIC RAILROAD, CONSOLIDATED WITH MRS. LUCY JACKSON VS. VICKSBURG, SHREVEPORT & PACIFIC RAILROAD.

When a space which is indicated on the plot of a town site as a public street is used, occupied and enjoyed as such for a series of years for the uses and purposes of traffic and commerce, and private rights have been acquired with reference thereto, the dedication to public use has thereby become so effectual as to preclude the owner of the soil from retaking the property free from the servitude of way.

When a dedication to public use of certain spaces as streets is made by a public act duly recorded, the map or plot thereto annexed and made a part thereof becomes part of the authentic evidence of the dedication, and the spaces, measurements and distances may be examined and used in connection with the act in determining the completeness and sufficiency of the dedication.

The acts and conduct of a person who is a party to an authentic act of dedication are bound by the contemporaneous interpretation such acts and conduct have placed upon it, and on the faith of which the public has acted during a series of years, and with reference to which property rights have been acquired.

A PPEAL from the Second Judicial District Court for the Parish of Bienville. *Watkins, J.*

J. E. Reynolds and J. H. Dormon for Plaintiffs, Appellees.

Stubbs & Russell and Wise & Herndon for Defendant, Appellant, cite: 37 An. 497; Am. and Eng. Ency. Law, Vol. 5, p. 402; 41 An. 867; 7 Am. and Eng. Corp. Cases, 421; 8 An. 285.

Armistead vs. Railroad Co., Consolidated.

Argued and submitted June 11, 1895.

Opinion handed down, June 21, 1895.

Rehearing refused June 29, 1895.

The opinion of the court was delivered by

WATKINS, J. The defendant is appellant from a verdict of a jury, and the judgment thereon based, in favor of the plaintiffs and appellees, decreeing (1) that what is denominated as Myrtle street in the town of New Arcadia is a public street of that town; (2) that there are obstructions now in said street which should be removed; that the plaintiff and appellee, Mrs. Lucy Jackson, should have and recover of and from the defendant the sum of two hundred dollars, for the damages which were occasioned to her property by the increased volume of water which was thrown upon her property by the defendant, on account of the obstructions it was ordered to remove—all other claims for damages being rejected and disallowed by the jury.

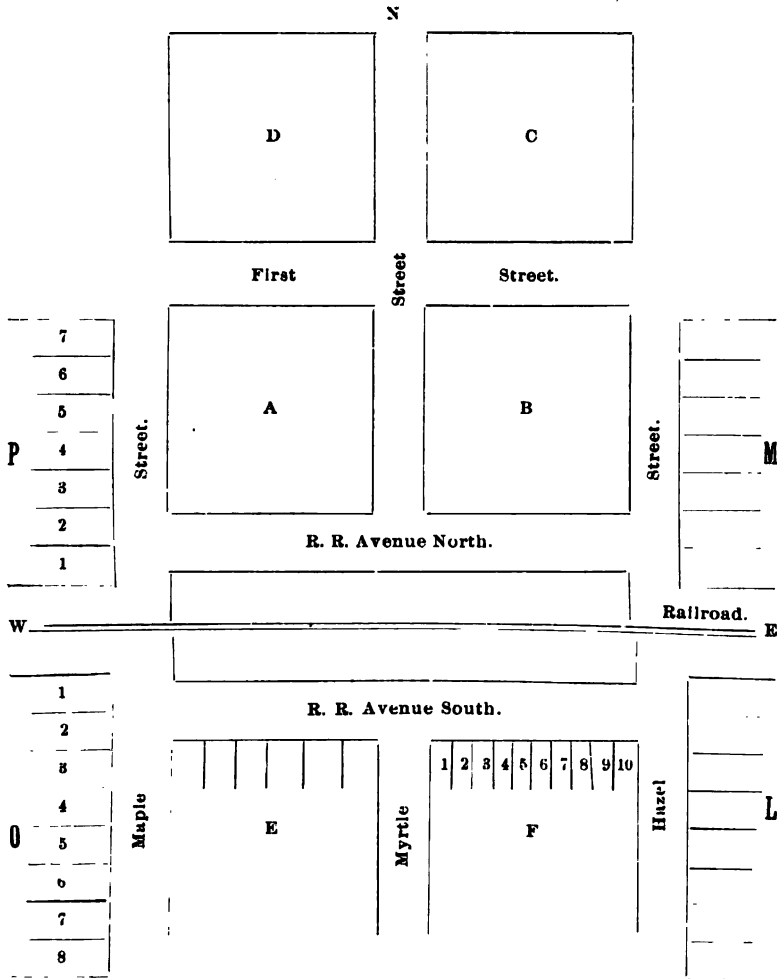
In this court W. W. Armistead, plaintiff and appellee, appears and answers the appeal, and prays that the judgment appealed from be so amended as to order the defendant to remove the extension of their station and other improvements from Myrtle street in the town of New Arcadia; and further so as to award him the sum of three thousand one hundred and seventy-five dollars actual damages, and the additional sum of five thousand dollars punitive damages.

Mrs. Lucy Jackson also answers the appeal and prays a similar amendment as to the removal of the obstructions complained of, and for an increase of the amount of damages allowed to four thousand five hundred dollars actual damages up to the time of rendering judgment, and two dollars and fifty cents per day, for each additional day, until said obstructions shall have been removed out of Myrtle street, and in the further sum of five thousand dollars punitive damages.

While it is not conceded to be perfectly accurate in one or two particulars, and not exactly conforming to the maps and profiles that are introduced in evidence, we will extract from the brief of the defendant's counsel an exhibit which pretty clearly exhibits the *locus in quo* and discloses the matter in controversy between the litigants to be, that portion of ground which is designated as a par-

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allelogram, through which the line of the defendant's track is delineated:



The claim of the plaintiffs is that when the addition to the town named and styled New Arcadia was plotted the space which is designated on the sketch as Myrtle street was extended entirely through the town from north to south, and dedicated by the owner of the soil to public uses as a street or passage-way for the public, and

which, on account of such dedication to public use, the defendant had no legal right to obstruct in any way.

On the other hand, that of the defendant is that its franchise and right of way entitled it to construct its depot, buildings and other works and improvements needful for the operation of its trains and the handling of its traffic across the space asserted to be so dedicated to public use, and that it is legally entitled to use and maintain the same.

With great elaboration and detail plaintiffs have stated their case to be, that recently, and without any right or authority, the defendant has built an extension to its depot, so as to extend it across Myrtle street, and thus obstruct its use by the public, and precipitates a large quantity of water upon the adjacent property of Mrs. Lucy Jackson.

They aver that the defendant is estopped from denying that Myrtle street crosses the railroad track, and that the ground on which the extension of the depot is built is a part of Myrtle street, for the following reasons, viz.:

1. That under an agreement between C. Q. Butler, F. P. Stubbs, F. Y. Dabney and the Vicksburg, Shreveport & Pacific Railroad Company, the town of New Arcadia was surveyed into lots and streets, one-half of said lots being on the north side of the defendant's track and the other on the south side thereof; one-half of the lots being on the east side of Myrtle street and the other half of the lots being on the west side thereof, a map of the whole of which was made and filed by defendant.

2. That as a part of said agreement C. Q. Butler, in 1884, executed a deed donating to the defendant a right of way for its depot grounds, as indicated by the map; and likewise donated streets to the public, as same are actually staked off on the ground.

3. That the defendant built the Myrtle street crossing over the track, and that this crossing, and the stakes on each side, showed that Myrtle street continued uninterruptedly across the railroad of the defendant.

4. That in pursuance with said deed and dedication the defendant sold lots on Myrtle street, and especially lots one (1) and two (2) and four (4) and five (5) in block F of the plan of said town.

5. That the defendant itself treated the crossing of Myrtle as a public crossing continuously from 1884, the date of the dedication,

to 1892, and that in the meanwhile all of its acts were such as to create the belief in the mind of the public that this space had been dedicated to public use, and did nothing which was calculated to give notice to the public that it was not a public crossing.

6. That the town authorities worked Myrtle street and kept it in repair up to the railroad track on both sides, and cut ditches on each side of the street up to the track of the defendant, and it kept in repair the crossing over the track, and dug ditches on each side of the street under its track.

Then follows the general averment that Myrtle street was the principal street of the town, and prior to 1892 almost the entire trade of the town crossed the railroad track on Myrtle street crossing. That the obstruction to Myrtle street has caused great loss and damage to the plaintiffs in their respective businesses.

That by the obstruction which the defendant placed on Myrtle street, a large quantity of rain water had been diverted from its natural and legitimate course and precipitated upon the property and premises of the plaintiff, Mrs. Jackson, causing her great damage and injury.

The defence of the railroad company is a general denial, coupled with the special defence that the space of ground, as indicated upon the sketch, between Hazel street on the east and Maple street on the west, and designated as a parallelogram, through which its track is traced, is its private property, and that Myrtle street does not cross it.

That Myrtle street north terminates at this parallelogram on its north side; and likewise it terminates at this parallelogram on the south side. That no part of the space which is included within the limits of said parallelogram has been at any time dedicated to public use, directly or by implication. That if it was so used by the public as a street, it was with the distinct understanding, as expressed by the defendant's agent, that it was so used without the consent of the company, and that the public should acquire no right thereby. That the attempts of the town authorities to assume control of this space as a *locus publicus* was, at all times, protested against by the company's agents, and their protest was effectual in preventing undue interference. That the company has always denied and resisted the right of the town to extend its authority so as to include the property in dispute.

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and space of the defendant in so far as the record is concerned, leaving no doubt as to the *locus*, the intention to dedicate and the fact of dedication—the proof disclosing that all the streets and squares were staked and measured as indicated in the deed and plat.

Quite an important feature of this case is that the defendant had acquired and owned an interest in the property of this new town. Also that the defendant first built the crossing on Myrtle street even before it had erected its depot buildings, as was stipulated in the deed of dedication, thus clearly evidencing its contemporaneous construction of its rights thereunder.

Without going fully into the details of the matter we will state, in synoptical form, the result of our investigation of the testimony found in the record.

That at the time of the dedication there was a survey made of the *locus* and stakes put down at the corner of each block, on either side of the railroad track. Nothing indicated to the eye of an observer that Myrtle street stopped at the defendant's parallelogram, but, on the contrary, it appeared to extend across the track. At the crossing of the track Myrtle street had the same appearance as other streets of the town.

That not only was the crossing on Myrtle street *established* by the defendant, but it was worked and kept in repair by the company's servants and employees up to 1892, when they undertook to establish an addition to its depot over the street crossing, and therewith blocked the passage-way.

During the series of years from 1884 to 1892 the authorities of the town of Arcadia worked and kept in repair the street on either side of defendant's track, and caused a ditch to be dug on either side of the street, and caused the like ditches to be dug under the bed of the railroad, from north to south, entirely across the defendant's parallelogram. That the defendant's servants and employees dug the ditches underneath the bed of the railroad, and kept the same open and in repair.

That defendant built its depot, originally, on a line with the west side of Myrtle street, on both sides of its track, and also on a line with the business houses on the west side of said street, above and below the railroad track. That the railroad crossing came right up to the east end of the defendant's depot. That the depot was not

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built by the defendant until six or eight months after the establishment of the street crossing.

That the warehouse which stands adjacent to the depot was built up to the east line of Myrtle street by the direction of defendant's agent, the west end being placed on a line with the east side of Myrtle street, and on a line with the buildings on the east side of Myrtle street, above and below the railroad. That this warehouse having thus been established, the entire length of Myrtle street was left open, and free from obstruction. That from the time the depot was first built, in 1884, to the time of the erection of the addition thereto, in 1892, the crossing on Myrtle street was the principal railroad crossing in the town of Arcadia. That it was used as a public crossing, and Myrtle street was the main route of travel for people going in and out of the town. That this crossing was freely, openly and publicly used as part of York street from 1884 to 1892, without question or dispute. That during that interval of time properties and town lots in the vicinity of Myrtle street were bought and sold with reference to the uses and conveyances of this as a public crossing of the defendant's track, and common for the purposes of the businesses and traffic of the public, and that on that account higher prices were demanded and obtained.

That when, in 1892, the defendant proposed to extend its depot east across Myrtle street, the town council made a formal protest against it, using the following language in its resolution, viz.:

"We beg leave to say that we approve the plan except the occupation of the crossing east of the present depot. The crossing named is a crossing which has been declared as such by action of the town council, and it is the main thoroughfare of the town. Hence, to allow said crossing stopped up would materially militate against the interest of the whole community, both town and country. Therefore, we respectfully ask that the extension be made on the west end of present depot, or that the present depot be moved west sufficiently to admit of the addition being made to the east end without obstructing the crossing above named."

Reference to the plot of the town discloses that the defendant's right of way, at the west end of its former depot, at its intersection with Myrtle street, is of one hundred feet in width and of four hundred in length, thus affording ample room for the proposed addition to its depot at that point, without detriment to the public interest

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by obstructing the Myrtle street crossing, or serious inconvenience to the defendant's business.

The foregoing protest of the town authorities being altogether disregarded by the defendant, the council adopted a formal ordinance instructing and requiring the town marshal to wait upon defendant's agent and representative and notify him that they "would not submit to the closing, or in any obstructing the passage by foot or vehicle of the public crossing, immediately east of the defendant's depot and known as Myrtle street," etc.

This protest was likewise disregarded by the defendant, and Myrtle street was completely obstructed by the establishment of an addition to its depot across the space which had been dedicated as a public street.

From a careful perusal of the record, and as fully illustrated by the foregoing excerpts from the evidence, it is our deliberate opinion that the dedication was complete and perfect, and that it has been so interpreted by the acts and conduct of the defendant during a series of years, and on the faith of which the public has acted and with reference to which private contracts have been made, and on which property rights have been founded.

In this situation the defendant had not even the color of legal right to arbitrarily resume possession, notwithstanding it was owner of the soil.

The subordination of the space indicated on the plat as Myrtle street was perfect and complete, and the public is entitled to be restored to its use.

In so far as the increased allowance of damages are concerned we regard them as too speculative and remote to base a judgment upon. *Schleider vs. Deilman*, 44 An. 482. We note the fact as one worthy of consideration that it was the defendant who moved for a new trial in the lower court; and that plaintiffs seemed to have acquiesced in its refusal without argument. But we think the plaintiffs are entitled to an amendment requiring defendant to remove the obstructions which are complained of.

It is therefore ordered and decreed that the judgment appealed from be so amended as to require the defendant to demolish and remove, at its own cost, the obstructions which are complained of, and that, as thus amended, the judgment be affirmed.

Perez et al. vs. Railroad Co. and McMahon & Sons.

No. 11,498.

GUILLAUME PEREZ ET AL. VS. THE NEW ORLEANS, CITY & LAKE
RAILROAD CO. AND T. J. MCMAHON & SONS.

The driver of a tally-ho, laden with passengers to whom the proprietors had hired the vehicle to go to a specified destination and return, in attempting to cross a railroad track comes in collision with a rapidly approaching train, whereby the vehicle is demolished and one of the passengers killed, is guilty of gross carelessness which subjects the proprietors to damages in favor of the deceased passenger's parents.

Unless the passenger undertakes the management and direction of the driver of such public conveyance in some manner, outside of indicating the route he is to travel, and the destination to which he is to take him, he incurs no responsibility to the proprietor for the happening of an accident through the driver's acts; and the passenger's failure to advise the driver does not subject him to the charge of contributory negligence.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor J.

Louque & Pomes for Plaintiffs, Appellants.

Walter D. Denegre and *George Denegre* for New Orleans, City & Lake Railroad Co., Defendant, Appellee.

Gilmore & Baldwin for T. J. McMahon & Sons, Defendants, Appellees.

Argued and submitted May 8, 1895.

Opinion handed down June 3, 1895.

Rehearing refused June 27, 1895.

The opinion of the court was delivered by

WATKINS, J. In June, 1892, plaintiff's son, in company with nine other young men, hired from the defendants, T. J. McMahon & Sons, a tally-ho to carry them to West End. On returning at about the hour of 11 o'clock P. M., the tally-ho came in collision with a train of the defendant railroad company, while attempting to cross its track at the junction of Canal street and Carrollton avenue; and, as a result of the collision, the tally-ho was demolished and the son of plaintiffs killed, after being dragged several hundred feet.

47	1391
49	103
47	1391
50	444
50	1088
51	290
47	1391
109	104
109	737
109	1042
109	1044
47	1391
116	473

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Alleging that the accident and fatal injury were occasioned by the mutual negligence of the engineer of the locomotive and that of the driver of the tally-ho, plaintiffs sued both, claiming against them in *solido* damages in the sum of ten thousand dollars.

The defendants, T. J. McMahon & Sons, tendered an exception to the effect that the firm had been dissolved, and that they were not suable in their partnership name.

The railroad company tendered a plea of no cause of action.

These exceptions having been overruled, and the railroad company having obtained a severance of trial, each of the defendants filed an answer, that of McMahon & Sons being a general denial, and that of the railroad company being a general denial, coupled with the special defence that the accident was caused through the fault and carelessness of the driver of the tally-ho.

The cause first went to trial before a jury, who rendered a verdict in favor of McMahon & Sons, and on the following day there was a similar verdict in favor of the railroad company.

The plaintiffs have appealed from both judgments, and both causes are brought up in one transcript. With regard to the exception of McMahon & Sons, the facts appear to be as follows, viz.:

That they had been for several years engaged in the livery and undertaking business, and, for their own convenience, they sought to establish a limited company, but did not perfect it, or put their project into operation, at least in so far as the general public was concerned.

For instance, their old sign remained upon their vehicles, and particularly upon the one which was hired to the party of young men on the evening of the fatal accident. They continued to use the same bill heads. Their bank account remained unchanged, and their checks were drawn in the same way. The firm name was unaltered in the city directory.

As parties hold themselves out to a community, so will they be bound on their contracts. McDonald vs. Millaudon, 5 La. 403; Grieff & Byrnes vs. Boudousquie & Fortier, 18 An. 631; Story on Partnership, 36; 3 Kent, 31.

In Baldey & Lightner vs. Breckinridge, 39 An. 660, the court say: "In point of fact there may have been no partnership, but that can not affect the rights and claims of plaintiffs who dealt with the de-

fendants as partners, and upon their own acts and representations to that effect.

"Parties, though not partners *inter se*, may be such as to third persons."

We think this exception was properly overruled.

Notwithstanding the severance of trial the testimony on each of the trials was about the same.

The state of the appears case to be as follows, viz.:

On returning from West End toward the city the driver of the tally-ho took the right-hand side of Canal street coming in, and when he had reached the intersection of Carrollton avenue he attempted to cross over the track of the railroad to the other side, there being at that place a barricade erected so as to prevent travel upon the newly-graveled roadway on the side he was traveling. As a witness, the driver testified that before attempting to cross he looked and saw the approaching train, and, fully believing that he had sufficient time to cross the track ahead of the engine, he attempted to cross. The tally-ho was struck just in front of the rear wheels and completely demolished, six of the passengers being scooped into the engine. One jumped to the left hand, two to the right hand, and the plaintiffs' son was killed.

This occurrence happened on a clear moonlight night, the railroad track was straight, and the headlight of the locomotive burning brightly, and the tally-ho carried regulation lights and Chinese lanterns besides.

The plaintiffs' contention is that the driver of the tally-ho was guilty of great imprudence and want of care in attempting to cross, as he did, in front of a moving train and in full view of it, and that the defendants' train was being run at a greater rate of speed than was prudent at the intersection of two important avenues of the city. That the engineer's attention must have been attracted to the tally-ho had it not have been for the presence in his cab of a person who had no right to be there, the engineer being occupied at the time with this visitor.

Therefore his conclusion is that both defendants are liable in *solido*.

The effort of counsel for McMahon & Sons was to show that the driver of the tally-ho was exceedingly careful in driving, and drove at a slow rate of speed; and to put the blame upon the railroad

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company on account of the reckless rate of speed at which it was being run at the time. While on the other hand, counsel for the railroad company use their best efforts to demonstrate from the evidence that the fault was exclusively that of the driver of the tally-ho, and resulted from his careless attempt to put his conveyance across the track, immediately in front of a rapidly approaching train, which was easily seen and plainly visible.

There can not be a doubt that the fault was upon one of the two, if not upon both—unless we are to adopt the theory that it was exclusively the fault of the driver of the tally-ho, and that he was the agent and servant of the passengers, and at their command and under their control and direction.

Pretermittin any expression on that question for the present, we will first attend to the exception of no cause of action, which was tendered by the railroad company, and by the court *a qua* overruled; and to which our attention is specially attracted by counsel for the railroad company.

It is to the effect that plaintiffs' petition alleges that the immediate cause of the accident was the carelessness or negligence of the driver of the tally-ho on which the deceased was riding.

And the averment of the petition that is relied upon as sustaining the exception is the following, viz.:

That plaintiffs' son, with others, "hired of T. J. McMahon & Sons a wagonette, or tally-ho, driven by a driver, an employee of said firm; that said driver, when on Canal street in this city, at the intersection of Carrollton avenue, attempted to cross the railroad track of the New Orleans City & Lake Railroad Company, when one of the trains of said company was approaching, when by reason of the approach of said train such attempt was dangerous, and that through the gross carelessness and recklessness of said driver in attempting said crossing, said wagonette was struck and demolished by the locomotive or dummy of the train;" particularly describing the manner of young Perez' death.

Accepting this statement, the counsel for the railroad company say it is quite impossible for it to have been in fault, or guilty of negligence, if, as plaintiff alleges, the driver of the tally-ho attempted to put his conveyance across the railroad track when one of the company's trains was approaching, "when by reason of the approach of the said train such attempt was dangerous, and that through the

gross carelessness and recklessness of the driver said wagonette was struck," and young Perez instantly killed.

And in this opinion we concur. The foregoing allegation is positive and unequivocal to the effect that when the driver attempted to cross the track the railroad train was dangerously near, and that he was guilty of gross carelessness and recklessness in attempting to cross. That admission of fact is binding on the plaintiffs, and there is no escape for them from its force and effect.

Accepting that statement, how can it at the same time be true that the railroad company was at fault?

If the train was, at the time of the driver's attempt to cross the track, dangerously near the crossing, it was certainly not to blame for the accident.

If this were an action by McMahon & Sons against the railroad company for damages, they certainly could not recover in the face of such an admission, and how can the plaintiff recover against the railroad company, having thus interposed as an independent, efficient cause, the gross negligence and carelessness of the driver of the wagonette?

We think it evident that the exception of the railroad company should have been sustained, and the suit, as to it, dismissed at plaintiffs' cost.

But with respect to the defendants, McMahon & Sons, the case is differently circumstanced. The plaintiffs' son, with the other young gentlemen, hired from the defendants, T. J. McMahon & Sons, a tally-ho, a public conveyance, to transport them to West End and back to the city again. The defendants furnished the conveyance with a driver for a fixed and stipulated consideration. The defendants were engaged in the business of hiring conveyances, as they did on this occasion. That was their business. The only part the young gentlemen sustained to the transaction was that of persons who had, for a designated price, entered into a contract of safe carriage with the defendants. The conveyance, as well as the team and driver, were at defendants' exclusive risk, and their management and direction were under their control.

We find it pretty clearly established by the evidence that the driver was careful, and drove his team at a steady and moderate gait. On the way out, as well as on the return trip, to the point where the accident happened, nothing occurred which presents the

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appearance of recklessness on the part of the driver. But just as the driver came to the intersection of Carrollton avenue and Canal street, and finding the right-hand roadway blocked so as to impede his further progress, he attempted to cross his team to the opposite side, immediately in front of a rapidly approaching train. The night being clear, and there being no obstacle to impede his view, the driver must have been, and confessedly did see, the train, and was undoubtedly guilty of gross carelessness in attempting to cross, when by waiting a few seconds the passage could have been made with perfect safety.

The proof shows that the locomotive engineer could not possibly have slowed up his train in time to have prevented the accident, it having been less than a block away when the vehicle was first discovered. And we think this is apparent from the situation, as it is described by all the witnesses. It is true that the train was "making time," though not traveling faster than usual, and consequently it could not have been checked within the space of a single block. Therefore, the *argument* of the defendants, McMahon & Sons, can not avail them as an offset to the carelessness of their driver.

We do not regard the proof as showing, or the fact to be, that the plaintiff's son was in any way identified with the driver, so as to defeat his action on account of his contributory fault. His seat in the tally-ho was at a little distance from the driver, and he was not in any manner directing or interfering with the movements of the train. Nor was this duty imposed upon him.

In Holzab vs. Railroad Co., 38 An. 185, quite a similar case is stated, and the court say:

"More elaborately stated, the doctrine is, that a party who is a passenger in a public conveyance is, in some way, identified with those who own or have charge of it, and that he can recover of the owner of another public conveyance that has collided with it and injured him thereby, *only* when they who own or have charge of the conveyance in which he is riding can recover—the principle being that their contributory negligence is imputable to him, so as to preclude his recovery from any injury when they can not recover in consequence of this negligence.

"The doctrine was first asserted in Thorogood vs. Bryan, 8 C. B. 115, decided by the English Court of Common Pleas, and while gen-

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erally followed in that country since, its correctness has been questioned there by high authority.

"In this country it has been followed by some courts and rejected by others.

"It is so unjust to attribute to a passenger the negligence of the agents of the company in whose carriage he is riding; so untrue, in point of fact, that any identity exists between them; and so true that it can only be held to exist by a sort of legal fiction that it is not surprising there has been a judicial revolt against the doctrine.

"The only way in which the identification of a passenger with the driver or train conductor can result, is by holding the latter to be the servant of the former; but that can not be, because the passenger has no control over the conductor; and the right to control the conduct of the servant is the foundation of the doctrine that the master is affected by such conduct, and is responsible for it. We should reject the doctrine as illogical and unjust, even in the face of authority as high as the English courts; but the question is set at rest for us by a decision just rendered by the United States Supreme Court," etc.

The case cited is *Little vs. Hackett*, 116 U. S. 366, the substance of the opinion being as follows, viz.:

"That a person who hires a hack and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for his acts or negligence, or prevented from recovering against a railroad company for injuries suffered from a collision of its train with the hack, caused by the negligence of both managers of the train and of the driver."

In the course of their opinion, the court reviewed the case of *Thorogood vs. Bryan*, cited *supra*, and disapprove of it, citing: *Bennett vs. Railroad Company*, 36 N. J. (Law) 225; *Railway Company vs. Steinbrenner*, 47 N. J. (Law) 161; *Chapman vs. Railroad Company*, 19 N. Y. 341; *Dyer vs. Erie Railway Company*, 71 N. Y. 228; *Transfer Company vs. Kelley*, 36 Ohio, 86; *Wabash Railway Company vs. Schacklet*, 105 Ill. 364; *Danville Turnpike Company vs. Stewart*, 2 Met. (Ky.) 119; *Louisville, etc., Railway Company vs. Case*, 9 Bush. 728; *Cuddy vs. Horn*, 46 Mich. 596; *Tompkins vs. Railroad Company*, 4th West Coast Reporter, 537.

The opinion then proceeds:

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"There is no distinction in principle whether the passengers be on a public conveyance like a railroad train, or an omnibus, or be on a hack hired from a public stand in the street for a drive. Those on the hack do not become responsible for the negligence of the driver, if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. * * * From the simple fact of hiring the carriage or riding in it, no such liability can arise. The party hiring, or riding must, in some way, have co-operated in producing the injury complained of before he incurs any liability for it."

In commenting upon the same question the New Jersey court said:

"If the law were otherwise, not only the hirer of the coach, but also all the passengers in it, would be under the constraint to mount the box and superintend the conduct of the driver, in the management and control of his team, or be put for his remedy exclusively to an action against the irresponsible driver, or equally irresponsible owner of a coach taken, it may be, from a coach stand, for the consequences of an injury which was the product of the co-operating wrongful acts of the driver and of a third person; and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and were even strangers to the route over which they were to be carried." New York, etc., Railroad vs. Steinbrenner, 47 N. J. 161.

This case is quoted and approved in *Little vs. Hackett*. Counsel for McMahon & Sons press upon our attention two New York cases, which have been recently decided, and insist that they sustain the opposite theory; but the cases referred to do not carry out their idea.

The first is *Hoag vs. the New York, etc., Railroad*, 111 N. Y. 199; but that case presents the question of an accident which happened to a gentleman while driving his own team—his buggy colliding with a passing locomotive.

The second is *Buckett vs. New York Railroad Co.*, 120 N. Y. 290; but that case presents the question of an accident happening to a gentleman while sitting by the side of the driver of a buggy which he had hired—the buggy colliding with a passing locomotive.

Those cases are not in point, because they were not public conveyances. But in no event can the authority of those cases prevail over the various authorities we have collated.

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On the faith of those authorities we assume it to be a proposition definitely settled that passengers on a *public* vehicle, whether street car, railway train, omnibus or tally-ho, do not exercise any control over the conductor or driver, unless they undertake to superintend and direct him further than to indicate the route which they wish to travel or the places to which they desire to go, and consequently do not become responsible for the negligence of the driver.

On this question the proof is clear to the effect that plaintiffs' son did not, in any manner, interfere with the driver in the management of his team.

Our conclusion is that the driver was solely and exclusively at fault in recklessly attempting to drive a heavily laden tally-ho across the railroad track immediately in front of a rapidly advancing train, at the hour of eleven o'clock at night; whereas by patiently biding his time for only a few moments he could have driven across in perfect safety.

It was the duty of the driver to have looked and listened before attempting to cross the railroad track. And notwithstanding that he did look and did plainly see the approaching train—the night being clear and the headlight of the locomotive distinctly visible—the driver *rashly* undertook to drive his tally-ho, containing ten passengers, across the track immediately in front of it, scarcely a block away and moving at a confessedly rapid rate of speed.

As between McMahon & Sons and the railroad company the fault was clearly that of the former, though it may be that the speed of the train was greater than is usual and customary, for it can not be supposed that the conductor of the train, seeing the team of McMahon & Sons traveling along a parallel roadway, believed that he would attempt to make the crossing. Consequently, he was taken by surprise, and was unable to put his train in a position to avoid an accident.

Consequently, we must examine the evidence and ascertain the measure of damages.

Plaintiffs put their claim to compensation upon the ground that their son was suddenly precipitated from the tally-ho against the locomotive by the collision of the two, and was thereby horribly mangled; that his body was dragged for a distance of several hundred yards; that he suffered great pain of body and anxiety of mind, and shortly afterward died.

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On this score five thousand dollars are alleged to have resulted in damages to their son, for the recovery of which the right of action "has survived by law" to them.

Their further claim is that as the parents of the deceased they are personally damaged in the killing of their son in the sum of twenty-five hundred dollars, occasioned by their own mental suffering and mental anguish upon ascertaining his sad fate and in beholding his frightfully mangled condition. They further allege that their son was about twenty years old, living with and working for them. That by his death they were deprived of his companionship and of his association and of his services, and on this score they claim twenty-five hundred dollars.

The proof discloses that the young man was in his twenty-first year at the time of his death. That he was a butcher in the market, and was working for his father, and had been so engaged since he was large enough to work. When his father first saw his son, during the night of the accident, he was dead. His body was horribly mangled. His parents were awakened from their sleep and informed of his death. It was a great shock.

Being interrogated as to the value of his son's services the father said: "He was my right hand." That he was so well up in the business that he could "trust the whole business to him and let him carry it on."

The evidence does not definitely show what length of time elapsed between the happening of the accident and the death of young Perez; but there was sufficient time for the train to make the first telephone station and the conductor to send the Charity Hospital ambulance and students to the locality of the catastrophe to render assistance.

Nor does it show any estimation of the value of young Perez' service to his father, that is to say, in dollars and cents.

Without, however, apportioning the same to the different items, our conclusion is to award to the plaintiffs the sum of fifteen hundred dollars, in full of their demands.

It is therefore ordered and decreed that in so far as the railroad company is concerned, the judgment be affirmed, but that in respect to T. J. McMahon & Sons, it be reversed; and it is further ordered and decreed that the plaintiffs do have and recover of T. J. McMahon & Sons the sum of fifteen hundred dollars, and one-half of all costs.

Thompson & Co. vs. Sheriff, et al.

No. 11,832.

W. B. THOMPSON & Co. vs. E. L. DANIEL, SHERIFF, ET AL.

It is a well established principle of jurisprudence that one can not judicially claim, at one and the same time, the thing and its price; nor can a litigant attack a judgment as null and void, and at the same time demand the fruits or proceeds of a sale made in execution thereof.

A creditor whose claim is unsecured by either privilege or mortgage has no right, under C. P. 801, to compel another creditor, who has a judicial mortgage, as well as the privilege of a seizing creditor, to bring the proceeds of sale into court for a ratable distribution *in concursu*.

A PPEAL from the Third Judicial District Court for the Parish of Union. *Barksdale, J.*

L. E. Thomas for Plaintiffs, Appellants.

J. D. Everett (*C. B. Roberts* of Counsel) for Defendant Sample, Appellee.

Argued and submitted June 6, 1895.

Opinion handed down June 21, 1895.

The opinion of the court was delivered by

WATKINS, J. Plaintiffs are appellants from a judgment sustaining the defendant's exception of no cause of action and dismissing their suit.

It appears from the record that in 1892 George E. Murphy became indebted to J. F. Sample in the sum of seven thousand and nine hundred dollars, for which he gave a confession of judgment, bearing date June 22, of that year.

In 1894 Sample filed his confession of judgment in court and proved same, and obtained a final and definitive judgment thereon; and as soon as the term of court had adjourned he caused a writ of *fi. fa.* to be issued thereunder, and the property of Murphy to be seized and advertised for sale.

Soon afterward the plaintiffs filed a third opposition to this seizure, coupled with an injunction restraining the sale, on the ground, mainly, that Sample had procured the seizure of *all* the property of their common debtor. They prayed for judgment against Murphy on his

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indebtedness to them, for the sum of about two thousand dollars, and asked for a decree canceling and erasing Sample's judicial mortgage on the property seized, praying that the proceeds of sale be brought into court and ratably distributed upon their claims respectively.

The plaintiffs also allege that Murphy was insolvent at the time, to the knowledge of Sample, and that Murphy and Sample had resorted to collusion and fraud to create, in favor of the latter, a preference to which he was not entitled in law, by the registration of his judgment.

The position to which this case is assigned by the counsel of Sample is, that the plaintiffs seek to have the proceeds of the sale of the property of Murphy realized by the execution under Sample's judgment, brought into court and "distributed amongst all the creditors of Murphy (whereas) Murphy is neither a bankrupt nor a declared insolvent." That plaintiffs' debt is an ordinary one, not entitled to any lien, privilege, or any lawful cause of preference, and for that reason they have no standing in court under C. P. 396. That Sample was the first seizing creditor, and as such has the seizing creditor's privilege on the property seized, which is a lawful cause of preference over the claim of opponents in the distribution of its proceeds. C. P. 722.

On the contrary, opponent's counsel insist that the relief they claim is grounded on C. P. 301, which is couched in the following words, viz.:

"The sheriff may be enjoined from paying the claim of the plaintiff out of the proceeds of the property seized if a third person oppose such payment, alleging that the defendant had no other property to pay his debts except that which had been seized, and pray that the proceeds of the sale be brought into court to be distributed among all the creditors of the defendant, according to the order of their respective privilege and hypothecation."

On the face of the papers plaintiffs' action appears to be threefold, (1) seeking to recover a personal judgment against Murphy as a common debtor; (2) to strike down Sample's mortgage and privilege so as to make way for the ratable distribution, that is proposed, of the sale under *fi. fa.*; (3) to obtain a decree of court ordering such ratable distribution of the proceeds to be made.

In other words, plaintiffs have sought to blend the relief the law

accords in a revocatory action with that accorded in a third opposition.

They are at once confronted with the well-established principle of jurisprudence that one can not claim at one and the same time the thing and its price; nor can he attack a judgment as null and illegal, and at the same time demand its fruits and proceeds.

In this case plaintiffs are in court claiming a proportionate share of the proceeds of a judicial sale, and at the same time demanding the annulment and revocation of this lien and privilege of the seizing creditor, charging collusion and fraud. *Provosty vs. Carmouche*, 22 An. 185.

Such pleading is inconsistent and irreconcilable.

But there is no claim made that Sample's demand is simulated or fictitious. Being genuine, Murphy had a perfect right to confess a judgment on his indebtedness to Sample. *Stein vs. Brunner*, 42 An. 772.

Sample was certainly entitled to have a copy of his judgment recorded so as to operate as a judicial mortgage on Murphy's property. He was equally entitled to execute his judgment as soon as the session of the court was at an end *sine die*.

Viewing the situation from this standpoint, the only course there was left open to the plaintiffs was to stand upon their third opposition, and abandon the cause as a revocatory action.

Coming to this proposition we have to consider what relief plaintiffs are entitled to under C. P. 301.

To our minds there is considerable force in the query of defendant's counsel, viz.:

"Now, if (opponents and other creditors of Murphy) are to be paid in the order of their privileges and hypothecations, what right of action has W. B. Thompson & Co. in their suit to enjoin the proceeds and ask for their distribution over (Sample) as the first seizing creditor, whereas theirs is an ordinary debt, unsecured by any privilege?"

Their contention is that the provisions of C. P. 301 have reference to a settlement among creditors *in concursu* among all claims, privileges or mortgages, one or both, and that they have no reference to the claims of ordinary, unsecured creditors, such as that of opponents. And in this view the averment of opponents' petition to the effect that Sample had obtained a seizure of all of Murphy's prop-

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erty, who was insolvent to his knowledge and utterly unable to pay his debts, takes on a great deal of significance, but that significance is, that on the face of the papers the claim of Sample enjoys a legal preference. Code of Practice, 301, was interpreted in the early case to mean that it made "a provision in favor of creditors who have a higher privilege than that of the seizing creditor. It directs the proceeds to be divided among creditors according to their respective privileges and hypothecations, including the privilege obtained by the seizure." *Campbell vs. His Creditors*, 8 R. 106.

Article of the Code 722 declares that the first seizing creditor is invested with a privilege by the mere act of seizure unless the debtor has been previously declared a bankrupt, and in this connection counsel for Sample very pertinently observes:

"Now, if a seizure created a privilege in those cases only in which the property of the debtor is sufficient to pay all his debts, the privilege would only attach in those cases in which it would be needless."

Recognizing the difficulty of his situation, counsel for opponents assail the decision of the old court in *Campbell vs. His Creditors*, and say:

"We are fully aware of the decision rendered by Judge Martin in his last days as reported in the case of *Campbell vs. His Creditors*, 3 Rob. 106, and it is that decision we desire to attack, believing as we do, that the interpretation there placed on Art. 301 repeals it as effectually as if the same had never been written. It is the only decision we can find to that effect, and for that reason we do not consider it *stare decisis*."

While it may be true that this is an isolated opinion of this court, counsel's proposition takes too much for granted.

In the case of *Mayewski vs. His Creditors*, 40 An. 94, this court affirmed a very important principle of the insolvent law upon the faith of a single decision and said:

"If we were to express an opinion on it, as a new question, we would feel inclined to differ from the views therein expressed, but when we take into consideration the great length of time that that opinion has been suffered to remain undisturbed, we may safely rest our approval of it on the consecrated doctrine of *stare decisis*."

But the opinion assailed is, in our opinion, in keeping with other and more recent adjudications under Code of Practice, 301, and we

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cite the following as inferentially applicable: *Deneufbourg vs. Didion*, 7 An. 344; *Dobard vs. Bayhi*, 38 An. 186; *Smith vs. His Creditors*, 21 An. 241; *Young vs. Municipality No. 1*, 5 An. 736; *Turner vs. Parker*, 10 Rob. 154; *Larthet vs. Hogan*, 1 An. 330.

In our opinion, the language of the article itself is too obvious for any doubt or discussion.

The judgment of the court *a qua* is correct.

Judgment affirmed.

NICHOLLS, C. J., absent.

No. 11,800.

BERTRAND WEIL, ADMINISTRATOR, VS. NEW YORK LIFE INSURANCE COMPANY.

In the matter of insurance, there is a marked distinction between a warranty and a representation, the latter constituting part of the proposal for insurance and the former part of the contract of insurance.

As a general rule, it has been laid down that a warranty must be a part and parcel of the contract of insurance, so as to appear upon the face of the policy itself, as in the nature of a condition precedent.

It must be strictly complied with, or literally fulfilled before the insured is entitled to recover on the policy.

The warranty need not be material to the risk, because it is of itself an implied agreement that the representations warranted are material.

A representation is not, necessarily, a part of the contract of insurance, nor is it of its essence; but it is rather something collateral, or preliminary, and in the nature of an inducement to it. It should, ordinarily, by some phraseology of the policy, be made part thereof.

A false representation, unlike a false warranty, will not operate to vitiate the contract, or avoid the policy, unless it relates to a fact actually material or clearly intended to be made material by the agreement of the parties.

A PPEAL from the Tenth Judicial District Court for the Parish of Rapides. *Andrews, J.*

White & Thornton and Robert P. Hunter for Plaintiff, Appellant.

Dinkelspiel & Hart for Defendant, Appellee.

Argued and submitted June 4, 1895.

Opinion handed down June 17, 1895.

47	1405
52	40
52	510
47	1405
112	585
112	585
112	588
47	1405
119	424

Well, Administrator, vs. Insurance Co.

The opinion of the court was delivered by

WATKINS, J. This suit has for object the recovery of \$5000 as the amount for which the defendant insured the life of Conrad Well, deceased, on policy bearing the No. 577,882 and bearing the date December 12, 1898, the insured having died January 22, 1894.

The defendant's answer admits the execution of the policy, but denies all liability, charging violation of the warranty clauses of the application and the policy. There was a trial of these issues, a judgment in favor of the defendant, and an appeal on part of the administrator of Conrad Well's estate.

The salient features of defendant's answer we will reproduce, and they are as follows, viz.:

"That the late Conrad Well, * * * to induce this defendant to issue said policy and to undertake to insure his life, made application in writing for said policy, which said application is a contract of insurance which was issued, only upon the faith of the statements and declarations made and contained in said application."

That in said application the deceased "made certain statements and representations and gave answers to certain questions propounded to him, and concerning facts then and there unknown to the defendant, but necessary and material to defendant's risk, in insuring the life (of the deceased) and issuing the policy," etc.

That in the course of the applicant's medical examination he was asked if he had "ever had severe headaches, vertigo, fits, or any nervous or muscular trouble," and answered "no."

That in truth and fact the deceased had an attack of trigeminal neuralgia in May, 1898, for which he was treated by a physician for the space of one week; that he had a convulsion on the 22d of October, 1898; and that in November, 1898, he was sick of *la grippe* for the space of about two weeks. "That all of said facts were concealed by (the deceased), and not reported to the medical examiner of this respondent."

That he was further interrogated as to the name and residence of his physician, to which he answered, "Dr. Randolph, of Alexandria;" and that he was requested to state "when and for what have his services been required," to which he answered "Dengue fever, last month." Thereupon the answer charges that the deceased concealed from the respondent the other diseases above set forth, for which he had consulted a physician and been treated by him.

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That he was further asked "what other physician have you consulted, when and for what," and his reply was, "none, and for nothing." Thereupon the answer represents that "said statements were false and untrue, for the reason that in addition to consulting Dr. Randolph as hereinabove set forth he had, from May 25, 1898, consulted Dr. Smith Gordon of Alexandria, La., for *supra-orbital neuralgia*, and in June or July (or perhaps later), 1898, the exact date of which is unknown to this respondent, but shortly before the issuance of said policy, the deceased visited the city of New Orleans for the purpose of being examined and treated by Dr. Rudolph Matas. That he was sent to Dr. Matas by his regular physician, the said Dr. Randolph, as an epileptic. That he was treated by the said Dr. Matas several times; was treated by him and received medicine from him."

Having thus enumerated the various particulars in which the statements and representations of the application of the insured are and were "false and untrue," and averred that the truthfulness of same was "necessary and material to defendant's risk," the answer declares:

"That the failure of the said Weil to disclose the material facts herein set forth caused the policy to be absolutely null and void, for the reason that in the application which it was agreed should be the basis of the contract between him and your respondent he warranted the answers to the medical examiner to be full, complete and true, and that the warranty was a condition precedent to and consideration for said policy, which was subsequently issued.

"That the answers aforesaid being untrue were a breach of the warranty, vitiating the policy and destroying the right to recover thereon."

The application contains the following clause, on which defendant places reliance, viz.: "That the statements and representations contained in the foregoing application, together with the declarations made by me to the medical examiner, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete and true, whether written by my own hand or not, this warranty being a condition precedent to and a consideration for the policy which may be issued thereon."

The policy contains a similar provision, viz.:

"This contract is made in consideration of the written application

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for this bond policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract," etc.

Upon the reverse of the policy an abstract of the application, the warranty clause and the declarations of the insured are endorsed, and made parts thereof; and a comparison instituted between the said declarations and the averments of the answer shows that the recitals therefrom in the latter are correct.

The physician who attended deceased during last illness certifies that he died of epilepsy, after a brief illness of three or four days, That he had been his medical adviser for about one year previous. and that he treated the deceased once in May of that year for supra-orbital neuralgia. With regard to the cause of his death, that statement is concurred in by two other physicians who were in attendance during the fatal illness. The statement of one of them is that he also attended the deceased during his attack of neuralgia in May, 1893. That he treated him for a fainting spell on October 22, 1893, and for *la grippe* in November, 1893. That the attack in May lasted one week, that in October one day, and that in November two weeks. He states that, under the treatment in each instance, the deceased was cured completely. These attacks were previous in date to the application which bears date December 7, 1893.

An examination of the testimony taken at the trial does not differ materially from the statements of the witnesses made parts of the proof of the death of the insured, which were furnished to the defendant.

The theory of the defendant's answer is that the application is the primary evidence, on the faith of which *only* the policy was issued to the insured, and that the validity and binding force of the *policy* necessarily depends upon the statements and representations which are made in the *application*.

Upon this theory the answer avers that the deceased made, in his application, certain statements and representations, and gave answers to certain questions propounded to him in the course of his medical examination, which is made part of the application, concerning facts "then unknown to the defendant, but *necessary and material to the defendant's risk*;" and it further represents that "said statements were false and untrue," and that the truthfulness of same was "necessary and material to the defendant's risk."

Reiterated the representations and statements alleged to be un-

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truthful are that he answered that he had never had any "severe headaches, vertigo, fits, or any nervous or neuralgic trouble," whereas he had an attack of trigeminal neuralgia in May, 1893, for which he had been treated by a physician for the space of a week; an attack of vertigo or convulsions in October, 1893, for which he was similarly treated for a period of several days; and an attack of *la grippe* in November, 1893, for which he was similarly treated for a period of two weeks. That these different attacks of illness were by the deceased concealed from the medical examiner, and consequently not made known to the defendant at the time it issued the policy.

And the further defence is predicated upon the fact that when interrogated as to the name and residence of his physician, the deceased only gave the name of Dr. R. D. Randolph, whereas, in truth and fact, he was attended by Dr. Smith Gordon as well as by Dr. Randolph during his attack in May, 1893; and was also examined and prescribed for by Dr. Rudolph Matas, of New Orleans, in May, 1893, at the suggestion of Dr. Randolph, of Alexandria. And in truth and fact he was attended by Dr. Gordon in September and October, 1893.

It is not a point made in the answer that the death of the deceased resulted from an *excepted cause* in the risk of the defendant; but this testimony is pertinent to show the *materiality* of the information which was necessary that the defendant should have known in determining whether it would issue a policy, and in enabling the court to estimate the probable effect of the failure of the deceased to make known these facts to the defendant through the instrumentality of his medical examination.

Reviewing the perol testimony of witnesses interrogated at the trial, we find the following facts substantially detailed, viz.:

Dr. Smith Gordon says he first attended the deceased on the 21st of May, 1893, and from the 21st to the 31st, when he turned the patient over to Dr. Randolph. That he treated him for supra-orbital neuralgia; that is to say, neuralgia of the tri-facial nerve.

Dr. Randolph says he attended Conrad Weil on the 21st of May, 1893, and up to the 28th of that month. On being interrogated with reference to those visits he was asked the question: "Was there any fainting fit or convulsion, or anything of the kind?" and his reply was: "*I saw no convulsion.*" But on being further interro-

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gated and requested to state what he discovered, he replied that "it looked like he had fainted."

It appears from the record that Conrad Weil paid a visit to Dr. Rudolph Matas, of the city of New Orleans, during the latter part of May or the early part of June, 1893, at the suggestion of Dr. Randolph, of Alexandria. His situation is better described in his own language, and it is as follows, viz.:

"That his face indicated suffering which was confirmed by his statement that he had been recently much disturbed by periodical but frequently repeated pains in the face, in the region of the eyes, cheeks and temples, and that these pains were much more intense in the left side of the face. There was a slight but distinct paralysis of the muscles corresponding to the painful regions, and this paralytic condition was more marked in the external muscles of the left eye and cheek. * * * The patient told me that he had had a fit, or convulsion, during which he lost consciousness, some time previously, and since that (occurrence) he had been seized (of) the pains in his face. He was much worried about his condition, and anxious to be relieved of those pains. He was, also, anxious to ascertain the relationship of the present trouble with his previous convulsion. I was not able to satisfy him in this respect, and I told him I would like to keep him under observation for some time before committing myself to a definite diagnosis.

"His condition impressed me as being serious, and that the local face symptoms were simply manifestations of some other grave disorder, or lesion of the central nervous system; but what that other condition was I could not tell.

"From his descriptions I concluded that he had an epileptiform convulsion, which had been caused by some reflex, possibly peripheral irritation of the inflamed nerves of the face * * * The patient came to see me again on two or three occasions, and appeared to me to be much relieved of his pains, and improved as to his paralytic symptoms * * * This apparent improvement led me to encourage the hope of final recovery, but the impression as to the gravity of his condition lingered in my mind."

Again: "The gravity of epilepsy is in proportion to the frequency and intensity of the convulsive paroxysms. Death very rarely occurs during an attack, but indirectly may cause a fatal issue. * * * At any period the symptoms may lessen and the patient

recover. Many cases, however, end fatally; but fortunately that condition is rare."

It is from the concurring statements of these three physicians that the situation of Conrad Weil on the 21st to 31st of May, 1893, was demonstrated.

Nothing further occurred that is worthy of note until the 11th of the following September, when Dr. Smith Gordon had occasion to visit him again professionally.

With respect to that visit the following occurred, viz.:

Q. For what purpose (did you visit him)?

A. Well, he was ill. I was there professionally.

Q. Do you remember what for?

A. Well, I can not say positively what the trouble was; he was over his chief trouble when I reached him.

Q. How long did you treat him on that occasion?

A. Only for two days; I made another visit to him on the 12th.

Q. Did you treat him at any other time in 1893?

A. On the 17th of October; also on the 22d of October.

Q. For what?

A. I don't know. I can not say exactly. The diagnosis was indefinite.

* * * * *

Q. Was he confined to his bed at all in May, do you know?

A. He was confined to his bed from the 21st to the 31st of May. Yes, sir. Or to his house. I really do not know whether he was in bed or not.

Q. Was (he confined to his bed) on the 7th of October?

A. Then, of course, he was confined to his house.

In speaking of the fatal illness of Conrad Weil the doctor was requested to state if, in his opinion, that was the first time he had suffered from this disease, and he replied: "No, sir; I think he had epilepsy before that, but I did not know it. I think two of the previous attacks must have been epilepsy—those when it was claimed he had the fainting fits. One of these was in September and the other probably in October. But two, I am sure, in which the family thought he had fainted. Really, I have no doubt they were mild attacks of epilepsy."

Dr. Randolph supplements this statement thus: That on the 26th of October, 1893, Conrad Weil came to him and requested him "to

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make a very thorough physical examination and see if he could find anything wrong about his health," etc.

Leaving out of view the attack of *la grippe*, or dengue fever, with which the deceased was affected in November, 1898, it strikes our minds with irresistible force that the *materiality* of the information with respect to Conrad Well's physical condition, during several months prior to the defendant's undertaking a risk upon his life, is fully established, and that this information was most material for the defendant to have known in determining whether it would or not issue a policy on his life.

And the foregoing testimony is fortified by the further statement of Dr. Smith Gordon with reference to the fatal illness of the insured, viz.:

"I did not see him at the beginning of the attack. He fell upon the floor of his store, so it was stated to me when I found him. He was in a comatose state—the secondary condition of an epileptic fit. He had a recurrence of those attacks from time to time until the period of his death, thirty-six or forty-eight hours afterward. I think he must have had twenty or thirty fits, continuing up to the time of his death."

The manner and circumstances of his death clearly indicate the carefulness of Dr. Matas' examination of the patient in May previously, and the correctness of his partial diagnosis then made.

Dr. Johnston, the medical examiner, says, as a witness at the trial, that if he had known that the deceased "had been treated for diseases (before his examination) he would not have passed him as a first-class risk, and it had been proved since that he had been treated before. In other words, if he had known *then* what he knew when testifying, he would not have passed him as a first-class risk."

In determining the probable effect of the deceased not having made these facts known to the medical examiner, the court is greatly assisted by the sworn testimony of the examiner at the trial.

It is unnecessary that we should discuss the question of the probable truthfulness of the statement of the deceased, or the wilful suppression of the facts in the course of his medical examination. This is altogether unnecessary for the decision of this case, the only question being whether withholding the foregoing material facts on the part of the insured constituted a violation of his warranty to

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the defendant which rendered the policy of insurance void *ab initio*.

Recurring to the averments of the answer, we find them to be that to induce the company to undertake to insure his life, the insured made an application in writing for the issuance of a policy of insurance, "*which said application is a contract of insurance,*" and that the *policy of insurance* was issued only upon the faith of the statements and declarations which are made and contained in said application.

The charge is then made that certain facts concerning the physical condition of the applicant, during the several months next preceding his application, which were material to the risk, and necessary for the defendant to have known in determining whether it would undertake the insurance of the life of the deceased, were neither disclosed in his application nor in his medical examination, which constituted an integral part thereof; and that, in failing to make these material and necessary disclosures, the answers of the applicant to the interrogatories of the medical examiner were, of necessity, untrue.

The answer then avers that the failure of the applicant to make the aforesaid disclosures rendered the policy void *ab initio*, for the reason that he had, in his application, warranted his answers to the medical examiner to be full, complete and true; and that this warranty was a condition precedent to, and a consideration for, the policy of insurance—the falsity or material insufficiency of the answers constituting a breach of the warranty, and vitiating the policy.

As previously observed, the application declares that the statements and representations therein contained, together with the declarations made to the medical examiner, shall form the basis of the contract of insurance between the insurer and insured, and that the same shall constitute full warranty of their truthfulness, and be a condition precedent to and a consideration for the policy.

And the recitals of the policy are to the effect that the contract of insurance is made in consideration of the written application of Conrad Well therefor, and "the agreements, statements and warranties thereof, which are hereby made a part of this contract."

Upon the reverse of the policy is endorsed a copy of the application, the medical examination of the deceased, and the warranty

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clause of the contract, thus making of them one complete and homogeneous whole.

It is to this condition of the contract for, and the policy of insurance, as interpreted by the evidence we have detailed, that we are to apply the law and determine the liability *vel non* of the defendant. As counsel for the plaintiff mainly rely for a reversal of the judgment upon the decision of the Supreme Court in *Mouler vs. American Life Insurance Company*, 111 U. S. 335, and have made elaborate quotations therefrom in their brief we will reproduce same, as we have compared them with the text and found them to be correct.

We quote from the syllabus of the decision:

"The principal reaffirmed, that when a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicants' statements to be a condition precedent to any binding contract, *the court should lean against that construction which imposes upon the assured the obligations of the warranty.*" (Italics ours.)

"An applicant for a life insurance was required to state, categorically, whether he had ever been afflicted with certain specified diseases. He answered that he had not. Upon an examination of the several clauses of the application, in connection with the policy, it was held to be reasonably clear that the company required, as a condition precedent to a valid contract, nothing more than that the insured would observe good faith toward it, and make full, direct and honest answers to all questions, without evasion or fraud, and without suppression, misrepresentation or concealment of facts with which the company ought to be made acquainted.

"In the absence of explicit stipulations requiring such an interpretation it should not be inferred that the insured took a life policy with the understanding that it should be void, if at any time in the past he was, whether conscious of the fact or not, afflicted with diseases, or any of them, specified in the questions propounded by the company. Such a construction of the contract should be avoided, unless clearly demanded by the established rules governing the interpretation of written instruments."

On the merits of that case the court says:

"The main defence was that the insured had been afflicted with

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scrofula, asthma and consumption prior to the making of his application, and that in view of his statement that he had never been so afflicted, the policy was by its terms null and void. There was, undoubtedly, evidence tending to show that the insured had been afflicted with those diseases, or some of them, prior to his application; but there was also evidence tending to show that he was then in sound health; but that at the time of the application he did not know or believe he had ever been afflicted with any of them in a sensible, appreciable form." The Circuit Court instructed the jury just what is contended for by the counsel for the defendant in the case at bar: "It is of no consequence, in such case, whether he knew it to be untrue or not; he bound himself for its correctness, and agreed that the validity of his policy should depend upon its being so." Again: "That he, the insured, did not know he was then afflicted is of no consequence whatever, except as it may bear upon the question, 'Was he afflicted?' If he was, his answer (for the truth of which he bound himself) was untrue, and his knowledge, or absence of knowledge, on the subject is of no consequence." Further: "You (the jury) must determine whether the insured was at any time afflicted with either of the diseases named. If he was, his answer in this report is untrue, and notwithstanding he may have ignorantly and honestly made it, the policy is void and no recovery can be had upon it."

These charges were severally excepted to by the counsel for plaintiff, and the United States Supreme Court held them all to be erroneous and remanded the case.

The court in this case cites with approval the following language from the case of *National Bank vs. Insurance Company*, 95 U. S. 673: "Where a policy of insurance contains contradictory provisions, or has been so framed as to leave room for construction, rendering it doubtful whether the parties intended the exact truth of the applicant's statement to be in a condition precedent to any binding contract, the court should lean against that construction which imposes upon the insured the obligation of a warranty. The company can not justly complain of such a rule. Its attorneys, officers or agents prepared the policy for the purpose, we should assume, both of protecting the company against fraud, and of securing the just rights of the assured under a valid contract of insurance. It is its language which the court is invited to interpret,

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and it is both reasonable and just that its own words should be construed most strongly against itself." *Citing, Grace vs. American Insurance Company*, 109 U. S. 278-282, the court proceeds to say:

"These rules of interpretation, equally applicable in cases of life insurance, forbid the conclusion that the answers to the questions in the application constitute warranties, to be literally and exactly fulfilled, as distinguished from *representations which must be substantially performed IN ALL MATTERS MATERIAL TO THE RISK; that is, in matters which are of the essence of the contract.*"

As to what is the proper signification of the word "true" in insurance contracts the decision is remarkably clear and explicit. We quote from page 345 of the opinion:

"The entire argument in behalf of the company proceeds upon a too liberal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were, in any respect, untrue. What is meant by 'true' and 'untrue' answers? In one sense, that only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But in another and broader sense, the word 'true' is often used as a synonym for honest, sincere, not fraudulent." In that case the court sums up the whole matter as follows:

"The jury should have been instructed, so far as the matters here under examination are concerned, that the plaintiff was not precluded from recovering on the policy unless it appeared from all the circumstances, including the nature of the diseases with which the insured was alleged to have been afflicted, that he knew, or had reason to believe, at the time of his application, that he was or had been so afflicted."

Comparing the foregoing quotation with the terms of Conrad Well's application and the defendant's policy it is evident that we are dealing with a different instrument, as it is perfectly clear, upon casual observation, that from the syllabus and opinion, in so far as it is quoted, the Supreme Court dealt with a policy of insurance, with regard to the correct interpretation of which they entertained grave and serious doubts. This is evidenced by the statement "that when a policy of insurance contains *contradictory provisions*, or has been so framed as to *leave room for construction*, rendering it

doubtful whether the parties intended the exact truth of the applicant's statements to be a condition precedent to any binding contract, the court should lean against that construction which imposes upon the assured the obligation of warranty."

Therefore the policy of insurance then under consideration did contain "contradictory provisions," and was "so framed as to leave room for construction;" and such being the case the court inclined "against that construction which imposed upon the assured the obligation of warranty."

For our examination counsel for the defendant has produced a complete transcript of that case, which contains a copy of the insurance policy, which the court then interpreted; and an examination thereof has disclosed the following as the controlling recitals thereof, viz.:

"This policy witnesseth that the American Life Insurance Company, in consideration of the representations made to them in the application for this policy * * * do insure the life of Louis Moulor, of New Orleans, * * * in the sum of ten thousand dollars."

Again—

"And it is hereby agreed and declared that if the representations and answers made to this company in the application for this policy, upon the full faith of which it is issued, shall be found to be untrue in any respect, or that there has been any concealment of facts, then, and in such case, this policy shall be null and void."

In Moulor's "application for insurance" the following stipulation occurs, viz.:

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue and evasive statements, or any misrepresentations or concealment of facts, *then any policy granted upon this application shall be null and void,*" etc.

Referring to the opinion of the court in the Moulor case, we find a striking paragraph explanatory of the conditions and stipulations of that policy, to which plaintiff's counsel make no reference at all.

It is as follows, viz.:

"We have seen that the application contains a stipulation that it

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shall form a part of the contract of insurance; also that the policy purports to have been issued upon the faith of the representations and answers in that application. Both instruments, therefore, may be examined to ascertain whether the contract furnishes a uniform fixed rule of interpretation, and what was the intention of the parties. Taken together, it can not be said that they have been so framed as to leave no room for construction. The mind does not rest firmly in the conviction that the parties stipulated for the literal truth of every statement made by the insured. There is, to say the least, ground for serious doubt as to whether the company intended to require, and the insured intended to promise, an exact, literal fulfillment of all the declarations embodied in the application.

"It is true that the word 'warranted' is in the application; and, although a contract might be so framed as to impose upon the insured the obligations of a strict warranty, without introducing into it that particular word, yet it is a fact, not without some significance, that that word was not carried forward into the policy, the terms of which control, when there is a conflict between its provisions and those of the application. The policy upon its face characterizes the statements of the insured as representations. Thus we have one part of the contract apparently stipulated for a warranty, while another part describes the statements of the assured as representations. The doubt as to the intention of the parties must, according to the settled doctrine of the law of insurance, recognized in all the adjudged cases, be resolved against the party whose language it becomes necessary to interpret. The construction must, therefore, prevail which protects the insured against the obligations arising from strict warranty" (our italics); pp. 342, 348.

This just and appropriate rule of construction was well and aptly applied in that case. It is the basis of that decision. The application, preceding the issuance of the policy, was looked into for the purpose of ascertaining the nature and character of the proposed obligations of the insured; but the terms of the policy were interpreted as controlling the contract of insurance which was actually entered into and binding upon the company. And, as the policy was found to contain no clause stipulating for a strict warranty, and it did not recite that the application formed a part thereof, that fact was construed in favor of the insured. But in the instant case the policy is altogether different. It stipulates in express terms as follows, viz.:

"I do hereby agree as follows: (1) That the statements and representations contained in the foregoing application, together with those made by me to the medical examiner, shall be the basis of the contract between me and the New York Life Insurance Company; that *I warrant same to be full, complete and true.*"

In discussing the theory which the Circuit Court entertained, the Supreme Court employed this language, viz.:

"The Circuit Court plainly proceeded upon the ground that the knowledge and belief (of the insured) as to having been afflicted with the diseases specified, or some of them, was not an essential element of the contract; in other words, if the assured ever had, in fact, any one of the diseases mentioned in his answer to the seventh question, there could be no recovery, although the jury should find from the evidence that he acted in perfect good faith, and had no reason to suspect, much less to believe or know, that he had been so afflicted.

"If upon a reasonable interpretation, such was the contract, the duty of the court is to enforce it according to its terms; for the law does not forbid to a contract for life insurance to stipulate that its validity should depend upon conditions or contingencies such as the court below decided were embodied in the policy in the suit.

"The contracts involved in *Jeffries vs. Life Insurance Company*, 22 Wall. 47, and *Ætna Life Insurance Company vs. France*, 91 U. S. 510, were held to be of that kind. But unless clearly demanded by the established rules governing the construction of written agreements, such an interpretation ought to be avoided."

This case seems to come clearly within the rule which was relied upon by the Circuit Court in deciding that case in the first instance.

But plaintiffs' counsel cite and confidently rely on *Alabama Gold Life Insurance Company vs. Johnson*, 2 So. Rep. (Ala.) 125, as strengthening and fortifying the theory which they insist is announced as controlling the decision of the Supreme Court in the *Mouler* case.

Counsel for the defendant has brought up for our examination a certified copy of the life policy which was therein construed, and from it we have made the following pertinent extracts, viz.:

"This policy of insurance witnesseth that the Alabama Gold Life Insurance Company, in consideration of the representations made to

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them in the application for this policy of insurance * * * do insure the life of," etc.

Again:

"And it is also understood and agreed by the within assured to be the true intent and meaning hereof, that if the declaration, or any part thereof, made by or for the insured, in the application for this policy, * * * and upon the faith of which this policy is made, shall be found in any respect untrue, then, and in such case, this policy shall be null and void."

Again:

"And it is further agreed, and the same is made a part of this contract." (*Vide* p. 127 of opinion for extracts from policy.)

It contains, neither in terms nor in substance, any stipulation of warranty, on the faith of which the insurance company issued its policy.

The opinion of the Alabama court thus presents its interpretation of the policy of insurance:

"The question of the most importance which is raised by the rulings of the court in this case is whether the answers made by the assured to the questions contained in the application for insurance are to be construed as absolute *warranties*, or in the nature of mere *representations*. The distinction between a warranty and a representation in insurance is frequently a question of difficulty, especially in the light of more recent decisions, which recognize the subject as one of growing importance in its relations particularly to life insurance. As a general rule it has been laid down that a warranty must be a part and parcel of the contract of insurance, so as to appear, as it were, upon the face of the policy itself, and is in the nature of a condition precedent. It may be affirmative of some fact or only promissory. It must be strictly complied with or literally fulfilled before the assured is entitled to recover on the policy. If need not be material to the risk, for, whether material or not, its falsity or untruth will bar the assured of any recovery on the contract, because the warranty itself is an implied stipulation that the thing warranted is material. It further differs from a representation in creating on the part of the assured an absolute liability, whether made in good faith or not. A representation is not, strictly speaking, a part of the contract of insurance or of the essence of it, but rather something collateral or preliminary, and in the nature of an

inducement to it. A false representation, unlike a false warranty, will not operate to vitiate the contract or avoid the policy, unless it relates to a fact actually material or clearly intended to be made material by the agreement of parties. It is sufficient if representations be substantially true. They need not be strictly or literally so. A misrepresentation renders the policy void on the ground of *fraud*, while a non-compliance with a warranty operates as an express *breach* of the contract."

This much of the opinion bears directly upon the principal issue in the instant case and is conclusively in favor of the contention of the defendant. It is in strict keeping with the principles we have extracted from the opinion in the *Moulton* case.

But after announcing the rule above formulated as applicable to policies of insurance containing a warranty clause, the court then states the principles of the law of insurance, which are applicable to the policy of insurance under consideration, and which, as has been shown, contains no covenant of warranty whatever. The opinion proceeds as follows, viz.:

"The mere fact that a statement is referred to, or inserted in the policy itself, so as to appear on its face, is not alone now considered as conclusive of its nature as a warranty, although it was formerly considered otherwise. Whether such statement shall be construed as a warranty or a representation depends rather upon the form of expression used, the apparent purpose of the insertion, and its connection or relation to other parts of the application and policy, construed together as a whole, where these papers constitute one entire contract, as they most frequently do." Quoting: *Bliss Insurance, Sec. 43, et seq.*; *Price vs. Phoenix Mutual Insurance Company*, 17 Minn. 497; 10 Am. Rep. 166-172.

"In construing contracts of insurance, there are some settled rules of construction bearing upon this subject which we may briefly formulate as follows: (1) The courts, being strongly inclined against forfeitures, will construe all the conditions of the contract, and the obligations imposed liberally in favor of the insured, and strictly against the insurer. (2) It requires the clearest and most unequivocal language to create a warranty, and every statement or engagement of the assured will be construed to be a representation, and not a warranty, if it be at all doubtful in meaning, or the contract contains contradictory provisions relating to

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the subject, or be otherwise reasonably susceptible of such construction. The court, in other words, will lean against that construction of the contract which will impose upon the assured the burdens of a warranty, and will neither create nor extend a warranty by construction. (8) Even though a warranty in name or form be created by the terms of the contract, its effect may be modified by other parts of the policy, or of the application, including the questions and answers, so that the answers of the assured, so often merely categorical, will be construed not to be a warranty of immaterial facts stated in such answers, but rather a warranty of the assured's honest belief in their truth, or, in other words, that they were stated in good faith. The strong inclination of the courts is thus to make these statements and answers binding only so far as they are material to the risk, where this can be done without violence to the clear intention of the parties expressed in unequivocal and unqualified language to the contrary. In support of these deductions, we need not do more than refer to the following authorities: *Moulou vs. American Life Ins. Co.*, 111 U. S. 335, 4 S. Rep. 466; *National Bank vs. Insurance Co.*, 95 U. S. 673; *Price vs. Phoenix Mut. Life Ins. Co.*, 10 Amer. R. 166, *supra*; *Southern Life Ins. Co. vs. Booker*, 9 Heisk. 606, 24 Amer. Rep. 344; *Fitch vs. American Ins. Co.*, 59 N. Y. 557, 17 Amer. Rep. 372; *Bliss, Ins.*, Sec. 34; *Campbell vs. New England Mutual Life Ins. Co.*, 98 Mass. 381; *Fowler vs. Aetna Fire Ins. Co.*, 16 Amer. Dec., note, 463, 466; *Piedmont, etc., Ins. Co. vs. Young*, 58 Ala. 476; *Parsons on Contracts*, 465; *Glendale Woolen Co. vs. Protection Ins. Co.*, 54 Amer. Dec. 309, 320; *Wilkinson vs. Connecticut Mut. Life Ins. Co.*, 30 Iowa, 119, 6 Amer. Rep. 657; 1 Phil. Ins., Sec. 388; Ang. Ins., Secs. 147, 147 a."

Finding that the policy contained no stipulation of warranty, the court held that the statements and representations of the insured were binding on him only in so far as they were material to the risk; and finding that the alleged misrepresentations related to matters which were *immaterial to the risk*, rejected the pretensions of the insurance company, and affirmed a judgment enforcing the policy.

The foregoing synopsis of the quoted cases will serve as a full and sufficient citation of adjudications, as the true distinction between policies containing covenants of warranty and those which do not, and it is so clearly and forcibly made, and backed with authorities, that any further argument would prove to be a work of supererogation.

With respect to warranty we have extracted from May on Insurance the following, viz.:

"In all contracts of insurance, certain statements are made, certain stipulations are entered into, etc.

"As a general rule, if these statements, stipulations, etc., are contained in, or explicitly made a part of the policy, they become warranties, and are so denominated in the law of insurance.

"An express warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfilment of which the validity of the entire contract depends. This is the definition given by Arnold, which has met with general acceptance. 2 Arnold's Insurance, 577. By warranty the insured stipulates for the absolute truth of the statement made and the strict compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover, in case of loss, should the statement prove untrue, or the course of conduct promised be unfulfilled. A warranty is an agreement in the nature of a condition precedent, and like that must be strictly complied with." May on Insurance, Sec. 156.

Again:

"Whether the fact stated, or the act stipulated for, be material to the risk or not, is of no consequence, the contract being that the matter is as represented, or shall be promised; and, unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer, the intervention of law, or the act of God, the insured can have no claim. * * *

"Indeed, one of the very objects of warranty is to preclude all controversy about the *materiality* or the *immateriality* of the statement.

"The only question is, has the warranty been kept?

"There is no room for construction; no latitude, no equity. If the warranty be a statement of facts, it must be literally true. If a stipulation that a certain act shall or shall not be done, it must be literally performed." *Ibid.*; 1 Bacon's Life Ins., Sec. 104, *et seq.*

Applying the principles of law herein above related to the application of the insured, and to the policy of insurance issued by the company, there is in our minds no possible doubt that there was a breach of the warranty by the insured, on the faith of which the in-

 State vs. Murray.

surer undertook the risk. We might go one step further and admit, for the argument, a proposition not admissible in law, that a covenant of warranty only guarantees the truthfulness of a statement of facts which is material to the risk, and yet, on the proof, the plaintiff would not be entitled to recover.

Judgment affirmed.

NICHOLLS, C. J., absent.

 No. 11,770.

STATE OF LOUISIANA VS. JIM MURRAY, ALIAS GREASY JIM.

Notwithstanding all the names which are drawn from the jury wheel were those of white persons, if proof be not administered that all the names therein were of white people, the theory of the defendant, a colored person, that discrimination against his race was resorted to on account of race, color, or previous condition of servitude, can not be of avail. And proof being made of the fact that persons of African descent were not excluded from the general venire, but, on the contrary, that some colored people were included therein, the charge that the accused has been deprived of due protection of the law is unfounded.

Act 170 of 1884, being an amendment of Sec. 2 of Act 98 of 1880, is not a local or special law, in the sense of Art. 48 of the Constitution—the constitutionality of the original act having been affirmed by this court.

Other bills of exception taken to rulings of the trial judge already affirmed and approved need not be again analyzed.

That a motion to transfer a cause to the Circuit Court of the United States has been made and overruled does not divest the court of first instance of jurisdiction; nor can a petition to same effect, subsequently filed in the Circuit Court of the United States, have that effect.

A PPEAL from the Criminal District Court for the Parish of Orleans. *Moise, J.*

M. J. Cunningham, Attorney General, *Charles J. Butler*, District Attorney, and *John J. Finney*, Assistant District Attorney, for Plaintiff, Appellee.

Thomas F. Maher for Defendant, Appellant.

Argued and submitted May 11, 1895.

Opinion handed down June 3, 1895.

Rehearing refused June 17, 1895.

47 1424
118 661
47 1424
118 660

The opinion of the court was delivered by

WATKINS, J. Having been convicted of murder and sentenced to the extreme penalty of the law, the defendant has appealed, relying upon a variety of technical pleas, though chiefly upon the complaint that he is a colored man and that the deceased was a white man, and in the selection and drawing of the grand jury there was an unlawful discrimination against the black or colored race in favor of the white or Caucasian race, whereby he sustained an unjust deprivation of his legal rights.

First in order is defendant's bill of exceptions to the overruling of his challenge to the array. Substantially, it is that in selecting the persons whose names were placed in the jury wheel, from which the grand jurors who found the bill and the petit jurors who tried and convicted him were drawn, the jury commissioners violated the provisions of various State and Federal statutes, as well as various provisions of the State and Federal constitutions, in that they discriminated against citizens of the black or colored race, so that he was deprived of an equal protection of the law during the progress of the trial.

That, consequently, the indictment against him was null and void.

Simplified, the complaint is that citizens of African descent were excluded from the jury wheel, and consequently from participating in the trial from the commencement to the end.

This, of course, depended upon the proof, of which the defendant carried the burden.

The evidence fails to support the challenge.

Each of the jury commissioners was called as a witness for the purpose of substantiating the charge, but their evidence completely overthrows it. The trend of their testimony is that they had acted with perfect fairness and impartiality in the discharge of all their duties as jury commissioners and in strict conformity to law.

That there were quite a number of names of colored men in the jury wheel at the time the *venire* was drawn, and that there were at least two colored men on the panel from which the grand jury who found the indictment against the defendant were chosen.

That they have never, in the performance of their duties, made any discriminations on account of race, color or previous condition of servitude.

Defendant's counsel also called and interrogated as witnesses

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quite a number of deputy sheriffs, who served summonses on the persons whom the jury commissioners desired to examine preparatory to jury service.

The purport of their evidence is that a large preponderance of them were constructively notified by making domiciliary service, and being unacquainted with them personally they could not state whether they were colored or white persons.

The evidence shows that there were some persons of color who were members of the grand jury who found the bill, and it is, therefore, quite clear that the general *venire* was not exclusively composed of white persons, and it is thus made clear that colored citizens were not excluded from the *venire* on account of race or color.

The trial judge cited and relied upon State vs. Joseph, 45 An. 905. It is quite a similar case, and the same issue was therein raised and decided.

Admitting the premises *arguendo*, the court say:

"It is quite true that all the names which were drawn from the box were those of white people, yet it is not established by any testimony in the record that all the three hundred names in the general *venire* box were those of white people. This is destructive of defendant's theory, because he had the chance of some colored persons being drawn from the box, unless it was exclusively made up of the names of white persons. And, in addition to this argument, is the fact, sworn to by one of the jury commissioners, that people of African descent were not excluded from the *venire* box on account of their race or color."

There is no question in our minds of the correctness of the trial judge's ruling.

With regard to the defendant's complaint as to the action of the court with reference to his motions for *subpœnas duces tecum* on the register of voters and the jury commissioners, nothing need be said, because they cnt no figure in the case, since the testimony which was elicited from the witnesses clearly show that his challenge to the array was groundless. As these subpœnas could not have practically affected the result, in the face of the positive testimony adduced on the trial of the motion, it might be conceded for the argument, that the proceedings under them were irregular, though such is not the case by any means, as the subpœna directed to the jury commissioners shows that it was intended only as a means of

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eliciting information, and not for the purpose of obtaining books and papers, which were particularly described therein.

Defendant's counsel retained a bill to the judge's refusal to quash the indictment on the ground that Act No. 170 of 1894, under the provisions of which the grand jury was drawn, is unconstitutional, null and void—it being a local or special law, and not enacted according to constitutional requirement by giving previous public notice.

The act drawn in question purports to be an amendment and re-enactment of Sec. 2 of Act 98 of 1880 to organize the Criminal District Court of the parish of Orleans, in pursuance of Art. 130 of the Constitution of the State; to create a Board of Jury Commissioners, and for other purposes.

Immediately after the title of this amendatory act comes this prefatory clause, viz.:

“Whereas due proof has been made that notice of intention to apply for the passage of this act has been published in accordance with the provisions of Art. 48 of the State Constitution,” etc.

The provisions of Art. 48 of the Constitution are as follows, viz.:

“No local or special laws shall be passed on any subject not enumerated in Art. 46 of the Constitution, unless notice of the intention to apply therefor shall have been published, without cost to the State, in the locality where the matter or thing to be affected may be situated; which notice shall state the substance of the contemplated law, and shall be published at least thirty days prior to the introduction into the General Assembly of such bill, and in the same manner provided by law for the advertisement of judicial sales.

“The evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed, and every such act shall contain a recital that such notice has been given.”

This amendatory statute appears to strictly conform to the foregoing constitutional requirement in every particular, and its recitals must be accepted as the final and conclusive proof of such notice of intention having been given, and that such proof was “exhibited in the General Assembly” before the passage thereof, there being no charge of fraud or ill-practice in procuring its enactment.

No extrinsic proof is admissible for the purpose of contradicting the recitals contained in a legislative act. *State ex rel. Morris vs. Mason*, 43 An. 590.

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But we think it evident that the amendment must follow the conditions of the statute that is thereby amended; and it was held and interpreted by this court not to be a local or special law. *State vs. Dalon*, 35 An. 1141.

In treating the question here raised, the court there said:

"It has no private or local good in view, but aims solely at the enforcement of the laws enacted for the prevention and punishment of crime. It is a public, a general act which regulates the common good of each and every member of the human family within the limits of the State.

"The words 'local' or 'special' are clearly used in contradistinction of the word 'general.'"

* * * * *

"A moment's reflection satisfies the mind that the intention to apply, alluded to, can only mean that of private individuals seeking some private advantage or advancement for the benefit of private persons or property within a certain locality.

"It is manifest that the act assailed was one of indispensable necessity to put in motion a court created by the Constitution, and which, without such legislation, would have remained lifeless and cumbersome."

We can but regard that reasoning sound and the authority of that decision complete.

On neither proposition can defendant's complaint be sustained. The judge below correctly declined to sustain the alleged unconstitutionality of the law and properly maintained the indictment.

Immediately after the defendant's motion to quash was overruled his counsel filed a motion to transfer the cause to the Circuit Court of the United States, which is exclusively based upon the grounds assigned in the challenge to the array of grand jurors and other rulings of the court previously discussed.

This motion was at once overruled and the transfer of the cause refused.

This refusal was a matter of course, in view of the previous rulings of the court below, which we have found correct and approved.

Had we, on the other hand, ascertained the fact to be that the jury commissioners were guilty of illegal discrimination against citizens of African descent, within the sense of the Federal statutea and

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Constitution, our ruling would have been different and the motion to transfer unnecessary.

After the trial was completed a motion for a new trial is made, substantially, upon the same grounds as those already gone over, coupled with a criticism of the written charge of the court to the jury.

Of course, the correctness of the rulings of the trial judge on the propositions enumerated necessarily draws to it the correctness of the judge's declination to grant a new trial predicated on the theory that his rulings were erroneous, and we have uniformly held that unless exception has been first taken to the charge of the court objections urged for the first time in a motion for a new trial will be of no avail.

At this juncture in the proceedings counsel for the defendant tendered a motion in arrest of judgment, based on the ground that he having filed a motion to transfer this cause into the Circuit Court of the United States, under and by virtue of Sec. 641 of the Revised Statutes of the United States, and having subsequently filed and docketed said petition in said Circuit Court conformably to law, this court is not possessed of jurisdiction or authority any further to proceed in the cause. And thereupon defendant's prayer is that the judgment of the court *a qua* be arrested, that the trial and verdict be declared a nullity, and that he be surrendered to the Circuit Court in order that the cause be therein proceeded with according to law.

The question here presented, so far as the jurisdiction and authority of the court *a qua* is concerned, goes back to the challenge to the array again. If the challenge was causeless, all subsequent proceedings were, necessarily, legal and jurisdictional—ultimately subject to such decision as the Federal tribunals may make in the premises.

We must deal with the issues presented, and, in our view, there is nothing in them to justify the conclusion that the court *a qua* did not have full and complete jurisdiction. The motion in arrest was correctly refused.

Having examined this case with the care required in a case involving the life of a human being, we have reached the conclusion that there is no error in any of the rulings defendant has complained of. But we can not refrain from applauding the zeal and vigor with which counsel for the defendant has defended the accused.

Judgment affirmed.

SUPREME COURT OF LOUISIANA.

Longino et als. vs. Phipps.

No. 11,823.

~~Mrs.~~ ELLEN LONGINO ET ALS. VS. JOHN R. PHIPPS.

Persons who take possession of a succession are responsible to the other heirs for the portion taken by each heir, and not *in solido* for the entire succession. In cases of conflicting testimony, based upon the recollection of witnesses, and on estimates made by them, it is safe to accept the conclusions of the trial judge, whose position enables him to judge with accuracy of the weight to be given to the testimony of each witness.

APPEAL from the Third Judicial District Court for the Parish of Claiborne. *Barksdale, J.*

J. W. Holbert and J. E. Moore for Plaintiffs, Appellees.

McClendon & Seals for Defendant, Appellant.

Submitted on briefs June 8, 1895.

Opinion handed down June 17, 1895.

The opinion of the court was delivered by

MCENERY, J. This is a suit to partition the effects in the succession of I. Phipps, who died in the parish of Claiborne in 1892. The defendants concur in the demand of plaintiffs, but deny that they have received from the succession the amounts with which they are charged. There was judgment directing a partition and charging the defendants with certain amounts, and ordering the remaining property in the succession to be sold. The defendants appealed, and complain of the judgment decreeing more than they had received in the succession, and that they should not be held *in solido*.

It seems from the evidence that the defendant heirs, who were domiciled in the parish of Claiborne, except Mrs. Taylor, who had received her full share in advance, on the death of I. Phipps, took possession of the farm on which deceased lived, the stock and effects of the succession, and partitioned the proceeds among themselves. The testimony as to the amount of corn, fodder, cotton seed and the rental value of the place is based upon the recollection and estimates of the witnesses, and we are not disposed to disturb the findings of the District Judge as to the quantity of each left among the effects

of the deceased. In all cases of conflicting testimony, or where it is based upon estimates from the recollection of the witnesses, it is safer to accept the conclusions of the District Judge, as he has better opportunities of judging what weight is to be given the testimony of each witness. In this particular case it is of greater necessity to accept his conclusions, as the defendants had it in their power and failed to take an accurate inventory of the effects of the succession.

J. R. Phipps, one of the heirs, found among his father's papers a note due by one Short, the husband of one of the heirs. He sent this note, which was for five hundred and sixty-two dollars, to Short. The decree held Phipps and several of the heirs *in solido* for this note in case it is not returned to the succession. There was error in holding the other heirs liable for the note. The other heirs may have been in possession of the property of the succession with Phipps, but they are not liable for his individual disposition of its effects. J. L. Phipps drew from P. Loewenberg two hundred and ninety-nine dollars and nineteen cents for the use of the farm. The decree orders the heirs in possession to be held *in solido* to the other heirs for the amount, but as between the five heirs in possession of the property to be charged to J. L. Phipps.

The judgment in this particular is erroneous if it charges these heirs *in solido* for the portion of the succession received by each. Each heir is responsible for only that part of the succession which he illegally appropriated. We interpret the language of the decree to mean that Phipps is responsible for the whole amount, receiving his reimbursement from the heirs who participated in the disbursement of this sum. A decree ordering each heir to collate the portion he received would meet the requirements of the case, and be in accordance with the responsibility each assumed in taking possession of the effects of the succession.

The decree also makes the heirs liable *in solido* in the event of the property not bringing enough to equalize amounts due other heirs with those charged with specific sums, for the value of rent, corn, cotton seed.

The reasons assigned for the liability of each heir in the disbursement of the amount of cash drawn from Loewenberg will apply to this part of the decree also.

The defendants are liable for the costs of the sale, provoked by them without judicial process. It is claimed that there are some

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costs due by the succession in two cases. The succession is charged with the payment, and on the final partition each heir will pay his part of the costs, to be deducted from his portion. There is no necessity for incorporating this in the judgment.

The appellees ask that the judgment be amended so as to make its language more explicit as to the sale of the property. This prayer will be complied with, although there is no real necessity for doing so.

It is therefore ordered, adjudged and decreed that the judgment appealed from be amended so as to charge the heirs, J. R. Phipps, J. E. Phipps, F. L. Phipps and Mrs. Patrick, each with one-fourth of the sum of two hundred and ninety-nine dollars and nineteen cents, drawn from Loewenberg in 1892, and used on the farm, and with one-fourth of the value of the rent, corn, cotton seed and fodder; that the judgment *in solido* against G. E. Phipps, J. L. Phipps and Mrs. Patrick, for the Short note of five hundred and sixty-two dollars, be reversed.

It is further ordered that the decree be amended so as to order enough of the property of the succession to be sold for cash to pay the portion coming to plaintiff, Mrs. Longino, and that she be paid the proceeds of the sale, and that the portion of the minor heirs be sold for cash, or on such terms of credit as a family meeting may advise, the succession to pay costs of this appeal.

NICHOLLS, O. J., absent.

NO. 11,843.

THE BANK OF MINDEN VS. THE LAKE BISTENEAU LUMBER COMPANY.

It is not a good ground for dismissing an appeal, that the transcript has been filed before the expiration of the delay for answering the appeal. The appellee is only entitled to the delay in order to answer.

A bond that is good for a suspensive appeal is sufficient for a devolutive appeal.

It is the duty of the appellant to furnish a complete transcript. If a part of the record is not in the transcript, and such part is essential to decide the case, and the applicant makes no effort by *certiorari* to complete the transcript, after his attention has been called to the omission by a motion to dismiss, the appeal will be dismissed,

APPEAL from the Second Judicial District Court for the Parish of Webster. *Watkins, J.*

L. K. Watkins for Plaintiffs, Appellees.

Leonard & Randolph and *D. W. Stewart* for Defendants, Appellants.

Argued and submitted June 10, 1895.

Opinion handed down June 17, 1895.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

McENERY, J. The order of appeal makes it returnable "according to law." The transcript was filed May 18, 1895. The citation of appeal was served on appellees on April 1, 1895. The number of days in which they were entitled to answer had not expired when the transcript was filed. This is no cause for a dismissal of the appeal. The appellees were entitled to the delay before answering, and having done so and the case submitted, there is now no occasion for the delay. Objection is made to the insufficiency of the bond as to amount and the insolvency of the sureties. This is a matter for the consideration of the lower court.

The form of the bond is for a suspensive appeal. The appellee urges this to be insufficient and that it should have been devolutive in form. If it is sufficient as a suspensive appeal bond, which covers the costs in the case as well as the judgment in the principal demand, it is assuredly sufficient for a devolutive appeal where costs alone are recoverable on the bond. *Chaffe vs. Carroll*, 34 An. 122.

The interest of the appellee is shown by the petition for the appeal and the affidavit of the attorney attached to the same. The objection, therefore, of the want of an appealable interest in the appellant is not sustained by the record.

The plaintiff was a judgment creditor of the defendant corporation. He caused an execution to issue under it, which was returned "no property found." The plaintiff in execution on the sheriff's return, under Sec. 688 Revised Statutes, presented a petition to the District Judge for the appointment of a receiver for the corporation, and the liquidation of its affairs. The judgment, *fi. fa.* and return were annexed to and made part of the petition. The receiver was ap-

Heirs of Burney vs. Ludeling.

pointed, and the appellant, a stockholder, applied for and obtained an order of appeal from the judgment appointing the receiver. In order to decide the case the papers annexed to the petition are essential parts of the record. They are not in it. It was the duty of the appellant to send up a complete transcript. He has not shown that he was not in fault, nor has he applied for a *certiorari* to complete the record, even after the motion to dismiss was filed.

The appeal is therefore dismissed at appellant's costs.

NICHOLLS, C. J., absent.

No. 11,839.

HEIRS OF BURNEY VS. JOHN T. LUDELING.

The party in possession is the only one liable for rents, fruits and revenues. The true owner of property can avail himself of the judgment against the warrantor.

A PPEAL from the First Judicial District Court for the Parish of Ouachita. *Richardson, J.*

Charles J. Boatner for Plaintiffs, Appellants.

Wise & Herndon (E. T. Lamkin of Counsel) for Mrs. Katie Whithed, Tutrix, and F. T. Whithed, Co-tutor, Defendants and Appellants.

Stubbs & Russell for Stubbs and others, Defendants, Appellants.

F. G. Hudson for Mrs. M. C. Ludeling, Defendant, Appellee.

Argued and submitted June 8, 1895.

Opinion handed down June 17, 1895.

The opinion of the court was delivered by

MCENERY, J. This case was before us in the early part of the present session of this court and remanded for the sole purpose of

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identifying certain sales of real estate disposed of by the defendants. *Heirs of Burney vs. Ludeling et als.*, 47 An. 73.

On a trial, under the decree remanding the case, there was judgment for plaintiffs. Both parties appeal.

Without detailing at length the objections urged by parties to the judgment, we will state the complaints against it, which are, that interest was improperly allowed on certain sales from the date of the sales, and that the judgment is erroneous in not decreeing the defendants liable *in solido*, and that a part of the property was held in indivision, and sold to certain of defendants by Ludeling as the agent of all, and that these defendants being in possession of the property, the price thereof can not be recovered, as the judgment rendered had dispossessed them of title.

The answer to these objections to the judgment can better be explained by referring to the original opinion in this case, by which it will be observed that the theory upon which the decree was rendered is that the property in controversy was originally a plantation; had been cut up and divided into town lots, and its identity destroyed. The town had been abandoned, and the property was comparatively valueless. In other words there was an inability of the defendants to restore what they had originally acquired. Hence we said: "The obligation of defendants to restore the thing, the fruits and the revenues, or the price in case they have alienated it, results not from an offence, or *quasi* offence, but from a *quasi* contract."

The evidence did not disclose that any fruits or revenues were derived from the property. The property was acquired under the forms of law, and in this we distinguished the suit from one sounding in damages for a *quasi* offence, to which the allegations in plaintiffs' petition assimilated it. The defendants, had they sold the property in its original condition, could not have been sued for the price, without affirming the sale. Had prescription been acquired by the purchasers, they could not have recovered the price from the vendors. The vendors would not owe a restitution of the price to the plaintiff, but to his immediate vendee in *warranty*. The person who receives the fruits, rents and profits is the only one to respond for them. *Gillespie vs. Bank*, 35 An. 779; *New Orleans vs. Gaines' Administrator*, 181 U. S. 191.

If suit had been brought against the vendees of defendants and

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they had been evicted and judgment had been rendered against them for fruits and revenues, their warrantor would have been liable to them for the same. This provision of the civil law accomplishes the same result as that in the equity jurisprudence in the other States, it being the law of Louisiana that the warrantor must protect the vendee from the hardship of paying that which his warrantor ought to pay. The true owner can, of course, by subrogation, avail himself of the judgment against the warrantor. But before a recovery can be had for fruits and revenues due the owner by the vendee during his possession, there must necessarily be first a judgment obtained against the vendee and on a call in warranty against the vendor.

The particular facts in this case gave us a great deal of thought, and believing that the plaintiffs had been wronged when minors, we felt justified in making almost an exception of the case, and ordered a return of the price received by defendants for the property sold.

A suit against defendants' vendees and a judgment against them would not have had the effect of restoring the property as it originally existed. The defendants, under the facts in this case and for the reasons stated, are only liable for interest from judicial demand. The defendants are not liable *in solido*. This question was finally disposed of in the opinion and decree remanding the case.

What has been said will apply to the objection to that part of the judgment which makes some of the defendants liable for property purchased by them. It is out of their power to restore the property as it originally existed as a plantation.

It is therefore ordered that the judgment be amended so as to annul that part of it which makes some of the defendants liable for interest from the date of the respective sales, and it is now ordered that they pay interest from judicial demand. In other respects the judgment is affirmed, plaintiff to pay costs of appeal.

NICHOLLS, C. J., absent

 No. 11,848.

**ARDIS & Co. vs. THEUS & ARMISTEAD, AND BOARD OF LIQUIDATORS
ARCADIA STATE BANK vs. THEUS & ARMISTEAD.**

The insolvent condition of the husband and alleged suspicious circumstances at the time of a *dation en paiement* may exist, but if the reality of the indebtedness of the husband to the wife is shown and the property transferred bears a just

47	1436
49	971
47	1436
107	434

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proportion in value to the indebtedness and the wife is placed in possession of the property, the *donation* will be maintained.

If the father advances money to his son-in-law, who is in commercial business, with the intention that it shall be used in said business, and it is so used, the *intention* of the father that the advances were made for and in behalf of the wife can not prevail over the fact that the money was actually loaned to the husband. And the same may be said of land transferred to the husband for the purpose of raising money for his firm. The reason is the stronger when the husband is a silent member of the firm, lending it his name in order to strengthen its credit.

A PPEAL from the Second Judicial District Court for the Parish of Bienville. *Watkins, J.*

D. W. Stewart and J. E. Reynolds for Plaintiffs, Appellees.

J. A. Dormon and J. W. Holbert for Defendant, Appellant.

The creditor of the husband can not question the form or validity of a donation to the wife. 2 La. 40; 3 An. 610; 22 An. 487; 86 An. 219, 748.

A donation of immovable property may be made and stand good against creditors, when the father deeded the property to the husband and gave the price to the daughter. 2 La. 40; 17 An. 230; 22 An. 487; 26 An. 594; 32 An. 432.

Parol evidence admissible to show that money advanced to the husband was really intended as a donation to the wife. 22 An. 97; 27 An. 465; 10 R. 198; 13 An. 197; 10 La. 254; C.C. 1539, 1541, 1550; 34 An. 511; 36 An. 551, 565; 30 An. 966; 37 An. 209.

Argued and submitted June 12, 1895.

Opinion handed down June 17, 1895.

Rehearing refused June 29, 1895.

The opinion of the court was delivered by

MCENERY, J. These suits were consolidated, but it seems that we have only to deal with a transfer or sale of certain property made by defendant, Theus, to his wife.

We need not notice the facts as to the insolvency of the husband and the attendant alleged suspicious circumstances of the sale by the

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husband to the wife. These facts may exist and the sale to the wife to replace her paraphernal property converted by the husband be legal and valid.

As repeatedly stated by this court the essential facts to maintain the validity of the *dation* are the real indebtedness of the husband to the wife, the just value of the property transferred for the existing debt, and the delivery of the property to the wife.

If Theus owed his wife the price stated in the *dation en paiement*, and the property bears a reasonable proportion in value to the price, and she actually was placed in possession of the property before any right was asserted upon it, the *dation* will be maintained, regardless of the motives which actuated the husband in making restitution and of the financial embarrassment in which he may be placed.

In the instant case we will confine ourselves to an examination of the question whether the debt was owing from the husband to the wife.

Theus married the daughter of Captain Brice, a man of ample means, to aid and assist the husband, or to give to his wife ample portions of his fortune, as she was an only child. In 1882 Theus was in commercial business in the firm of Theus & Marburry. Captain Brice gave Theus two thousand dollars and loaned Marburry two thousand dollars, for which he took his note. Marburry sold his interest in the firm to Theus, the price being the two thousand dollar note held by Brice. This sum of four thousand dollars, it is alleged, Captain Brice gave to his daughter, which the husband converted, and for which he is indebted. Brice says that it was the intention that this sum was to be given to the wife; that his intention was that Theus should receive it for her account, and that for this sum he had no expectation of a return, nor was it his intention to receive from Theus a reimbursement. It is unfortunate that his intention was not expressed at the time, preserved in such shape as to be valuable to the wife and daughter, it is a noticeable fact that the wife had no appreciable knowledge of this donation; nor of the others which it is alleged the father made to her. The circumstance of an absolute absence of any declaration at the time, or any evidence whatever that the money was intended for the daughter, forces the conclusion that the money was a loan to the son-in-law, or an accommodation to him. This we think is sustained by the subsequent transaction between Brice and Theus. But this is the only item of the indebted-

ness which could possibly be allowed, and it is so insignificant in value to the property transferred that the *dation* would be set aside on this account. The money, if intended for the wife, was by the donor given directly to the husband to be used in commercial business, and to stand its chances in the uncertainties of trade. It was, given then, by the donor, for use by the husband immediately and under such conditions it would be carrying protection to the wife, far beyond the already liberal construction which the court has placed upon the articles of the *Code* in her behalf in the restitution of dotal and paraphernal funds. Captain Brice finally became a member of the firm of Theus & Co. He took no active interest in the firm, put nothing in it and, as he says, drew nothing out. His name was permitted to be used only to strengthen the firm and to give it credit. Yet he was a partner and was, with Theus, responsible for the firm's debts. He kept an account there, although it is stated he knew nothing of the manner in which the books were kept and never authorized the entries. They were made, however, and he is not in a position to deny them.

During the existence of the firm he advanced several large sums of money to Theus, which he says were also gifts to his daughter. Captain Brice was credited with these sums as against his account for merchandise which he owed, and in a running account at the dissolution of the firm there was a large balance due him. The amounts were moneys to Captain Brice's credit in Monroe and New Orleans, and were placed to Theus' credit, and drawn against by him, and on Theus & Co.'s books credited to Captain Brice.

These amounts Captain Brice says were intended as gifts for his daughter. Whatever may have been his intention, the facts show that they went into a commercial firm of which he was a member and figured in its affairs. The firm of Theus & Co. was embarrassed. A large tract of land, some 2800 acres, was sold by Brice to Theus. He says no price was paid for it, and this was also intended as a gift to Mrs. Theus. The matter also rests upon the intention, without an extraneous fact to show that a gift to Mrs. Theus was made. Theus mortgaged the property, and we understand Captain Brice to say that the "land transaction" was for the purpose of raising money for the firm of Theus & Co., or for securing by mortgage of the property some of the large creditors of the firm.

If we have misinterpreted his testimony, the facts show that the

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land was mortgaged to two creditors, in New York and New Orleans, for the purpose of securing the firm's indebtedness. Under the facts of this case this question is suggested: Can a parent advance money directly to the husband with the *intention* that it is a gift to the wife, when at the very moment of its advance there is the intention also that the money shall be instantly used by the husband in his commercial ventures? Every rule of construction is that the money is loaned to the husband, and can not be considered as a donation to the wife.

There is no doubt that Captain Brice, who is so well and favorably known, believed that by assisting the husband he was advancing to his daughter a part of his fortune, which would be returned to her. His testimony is on this line, and is open and candid; but it is unfortunate that his intention did not find some practical form in which to embody itself.

Judgment affirmed.

Nicholls, C. J., absent.

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No. 11,831.

HUGH J. McDONALD vs. LOUISVILLE & NASHVILLE R. R. Co.,
EAST LOUISIANA R. R. Co., NEW ORLEANS & NORTH EAST-
ERN R. R. Co.

A collision of railroad trains brought about by the concurring negligence of two companies will render them liable *in solido* to an injured party.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Benjamin Rice Forman for Plaintiff, Appellee:

Where a railroad company permits another company to exercise the franchise by running cars drawn by steam over its road, the company owning the road and to which the law has entrusted the franchise is liable for injury done. *Macon, etc., Ry. vs. Mayes*, 49 Ga. 355; 5 Wallace, 105.

Denégre & Denégre for Louisville & Nashville R. R. Co., Defendant and Appellee.

Harry H. Hall for New Orleans & Northeastern R. R. Co., Defendant and Appellant:

A railroad company authorized by act of the Legislature to contract, to perform its transportation with another railroad company may permit that company to use its tracks without becoming liable for the negligence of that company. Act 60 of 1870, Sec. 4; Hutchinson on Carriers, Sec. 515, p. 585, and authorities.

And such legal use of track and immunity will result from a traffic arrangement. Morawetz on Private Corporations, I, Secs. 378, 377, 378, 379, 380.

Farrar, Jonas & Kruttschnitt for East Louisiana Railroad, Defendant and Appellant.

Argued and submitted June 6, 1895.

Opinion handed down June 21, 1895.

Opinion refusing rehearing June 29, 1895.

The opinion of the court was delivered by

McENERY, J. The defendant corporations are sued *in solido* for ten thousand dollars damages inflicted upon plaintiff's wife in a collision of the trains of the first two defendants, at the intersection of the New Orleans & Northeastern Railroad and the Louisville & Nashville Railroad, at People's avenue and Patriot street, on the morning of October 14, 1894. There was judgment against the East Louisiana and New Orleans & Northeastern Railroad Company *in solido* for plaintiff in the sum of one thousand two hundred and fifty dollars, with five per cent. from date of judgment.

The East Louisiana, to reach its own track, has to pass over and use the track of the New Orleans & Northeastern Railroad Company. The East Louisiana was running its own train, and on its own schedule. They are separate corporations, and the contract between them is for the mutual interest of both lines covering the interchange of traffic between points on the line of the road of the New Orleans & Northeastern south of but not including Pearl River Station. There is nothing in the agreement to indicate ownership of the East Louisiana by the New Orleans & Northeastern, nor is there any stipulation that would indicate that the latter road

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is to be responsible for any damages to third parties by defective equipments of the former's trains running over the New Orleans & Northeastern tracks.

The plaintiff's wife was a passenger on the Louisville & Nashville Railroad when the collision occurred, and received severe and painful injuries, from which she had not entirely recovered when this suit was filed.

At the crossing, the Louisville & Nashville road, it is conceded, had the right of way; that is, the right when trains on both tracks were approaching the crossing, to pass over first.

The Louisville & Nashville Railroad train, as it approached the crossing, stopped at the "stop board," some three or five hundred feet from the crossing. It gave the usual signals, but no response was made by the train of the East Louisiana road.

The engineer of the Louisville & Nashville train, believing the track was clear, from hearing no signals, moved forward to cross. When seventy-five feet from the crossing, he saw the East Louisiana train coming at a distance of three-quarters of a mile. The train moved on, the engineer says, he was sure the engineer of the East Louisiana was preparing to stop. When one car was on the crossing, the engineer of the Louisville & Nashville became convinced that the East Louisiana would not stop. He then put on all the force he could to clear the crossing. There were eight coaches in his train, and the East Louisiana struck the sixth coach. The train, when put in motion to cross, was going at the rate of six miles per hour.

The "slow post" on the Northeastern road is 8500 feet from the crossing; the "stopping post" 300 feet. The engineer of the Louisville & Nashville says in his testimony: "When I saw him rolling by the 'stop board,' I knew the speed he was going at. I saw that he was not going to stop his train, and I threw the reverse lever down in the corner, and opened the throttle valve to get out of his way as quick as I could, but I couldn't do it quick enough on account of stopping at the 'stop board.'" The engineer of the East Louisiana says that as he approached the "slow board" he blew the whistle for the crossing, and "let his train," as he supposed, "roll up, 'half way,' as it was an incline." He was going at a high rate of speed, twenty-five miles per hour. When half way between the "slow board" and the "stop board" he applied the air brake, but it did not work. He called for hand brakes and succeeded in reducing the

speed of the train to two miles, when it struck the Louisville & Nashville train.

There is no doubt as to the negligence of the East Louisiana. The air brake, it is said, was in good condition when the train left the depot, and that it had been inspected prior to the departure of the train. The defect in the brake is accounted for on the supposition that it had been maliciously tampered with. There is no evidence of any kind that points to this conclusion. It is much more reasonable to assign as a cause the oversight of the inspector, or some inherent defect in the brake, than to attribute it to some depraved and malicious creature, without even the slightest suspicion upon any one.

Notwithstanding this defect in the air brake of the East Louisiana road, the accident would not have happened had the engineer of the Louisville & Nashville exercised ordinary care and judgment. When he saw the train it was in time, about two minutes from the crossing. It would take his train about the same time to go over the distance, say one thousand one hundred feet from where he first saw the approaching train, in order to clear it, if it kept at the same speed at which it was going, twenty-five miles per hour. Human life is too precious to take chances in the small margin of time here presented. He ought to have stopped his train and waited for the stopping of the approaching train at the "stop board" on the Northeastern Railroad track. Although the Louisville & Nashville train had the right of way, the engineer had no right to exercise it in the presence of immediate danger. In attempting to exercise this right, with the approaching train so near the crossing, he had to assume that it was in order in all its equipments, and no contingency would prevent its stopping at the "stop board."

The engineer's experience and his trained judgment ought to have taken in the situation and appreciated the danger in taking such chances within such limited time. The fraction of a minute was important in calculation, and the least derangement of the machinery or equipment of the approaching train would cause the loss of this precious time.

Surely human life is too valuable to be sacrificed to save in the scheduled time of a train such an inappreciable amount.

Both trains were in default, and the fault of each was simultaneous and concurred as a proximate cause in bringing about the accident. They are liable *in solido* to the plaintiff.

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It was said in argument that there was no contractual obligation between the plaintiff and the East Louisiana Railroad, as he was not a passenger on its train. The claim for damages arises as against the East Louisiana Road *ex delicto*. Had the Louisville & Nashville been without fault, would the plaintiff have been denied relief against the East Louisiana road? We see no force in this contention.

It is ordered, adjudged and decreed that the judgment appealed from be amended, reversing that part as to the New Orleans & Northeastern Railroad Company, and that part as to the Louisville & Nashville Railroad Company, and it is now ordered that plaintiff's demand against the New Orleans & Northeastern Railroad Company be dismissed, and that there be judgment against the Louisville & Nashville Railroad Company *in solido* with the East Louisiana Railroad Company for the amount of the judgment appealed; in other respects the judgment is affirmed, the defendant roads against which judgment is rendered to pay costs of appeal.

NICHOLLS, C. J., absent.

ON APPLICATION FOR REHEARING.

In the application for rehearing it is urged that the amount awarded by the jury and affirmed by this court is excessive, and that this court assigned no reason for the amount of damages allowed. It was entirely unnecessary to go into details of plaintiff's injury.

The testimony of the physicians show that her injuries were severer than mere bruises or contusions, and that the injuries inflicted were more than temporary. She was not well at the trial of the case and exhibited her injuries had to the jury. Dr. Butterworth, a competent physician, says that at the time of his testimony she suffered some, and this must be a necessary consequence of the condition of the hand, which he describes as having the outside bone of the hand fractured near the bone of the little finger; that she seemed to be nervous, and that the third and fourth fingers were stiff. This was the condition of the hand a few days before the trial. Besides, it is shown that the plaintiff was hurt about the shoulders; that her left leg was dark and bruised.

It is true the first physician who saw her discovered no fracture of the bone of the hand, but it is asking too much of this court to believe that the broken bone was a self-inflicted injury.

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From the condition of the plaintiff when she received her injuries and when she appeared in court, we are satisfied her suffering from the time of the accident until the trial was severe and painful. Dr. Butterworth says that the probabilities are that the plaintiff will never have her hand restored to its first healthful condition.

Under the circumstances of the case and the testimony in the record, the jury assessed the damages at a reasonable amount, and had we been disposed to interfere with the verdict we would have increased rather than diminished the amount of damages.

The cases referred to in the brief of defendants are, with few exceptions, those in which temporary injuries were suffered and the inconveniences to plaintiffs were limited.

Rehearing refused.

No. 11,787.

LOUIS RAYMOND MOUSTIER VS. BELLA MEYER, HIS WIFE.

The judgment of the lower court will be affirmed, on questions of fact, when the District Judge says the witnesses were of low character, prostitutes and till tappers, were inconsistent in their statements, some of which were improbable, and that upon his conscience he can not accept their statements.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

A. L. Tissot for Plaintiff, Appellant.

Submitted on briefs June 4, 1895.

Opinion handed down June 17, 1895.

The opinion of the court was delivered by

MCENERY, J. The plaintiff instituted this suit to obtain a divorce from his wife on account of adultery.

The plaintiff wronged the defendant wife, and afterward, on the 10th day of May, 1892, married her, as he alleges, to legitimate their child, a girl, born 18th day of September, 1890. He asks for the custody of the child.

After the marriage the plaintiff never lived with the wife nor had any marital relations with her. He has never supported her nor the

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daughter, nor in any manner contributed to their comfort. If the wife went astray the husband was to a great extent responsible by his want of attention to her, and in not supporting her with the necessaries of life, and in not giving her that protection which should shield her from temptation. Under these circumstances, if these facts stood alone, we would be reluctant to grant to the plaintiff the relief asked for, and thus add to the already overburdened wife the loss of her child, particularly when there is no assurance that she would be better cared for physically and morally.

The testimony in the record, cold and unsympathetic, leaves the impression upon the mind that the wife is depraved, and is physically a strong, healthy, unblushing prostitute. Under ordinary circumstances this testimony would be sufficient to free the husband from such a wife. It is a rule that great weight should be given to the opinion of the trial judge as to the conduct and appearance of the witnesses when on the stand. Fortunately, in this case, the lower judge has given a most graphic description of the witnesses, and the defendant and her protectors. His language is eloquent with indignant protests against the credibility of plaintiff's witnesses, and the modest, virtuous and unpretentious appearance of the wife, and the humble though impressive appearance of her protectors, the uncle and the grandfather.

He characterizes the two main witnesses of plaintiff as confessed prostitutes; one of them had been the mistress of plaintiff. "Much that I have said," says the District Judge, "as to these female witnesses, as to the inconsistency of their statements, applies to the witnesses Mank and Maggioli and Miller. The latter was a till tapper, a man of no morals, appearing in his manner and speech as unreliable, and the former, who did not stand the test of cross-examination, were his friends and associates. They are flatly contradicted by Contreras, in the matter of the particulars stated as to him.

"Defendant is a frail-looking, small woman. Her manner in court was shrinking, timid, modest, retiring. She has nothing in appearance or manner, in look or bearing, that would indicate the brazen, hardened, abandoned woman.

"I saw and heard the witnesses who accused the defendant, and, on my conscience, I am unable to accept and believe what they say. All the appearances of defendant, and of her family, and all the con-

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duct of the plaintiff's family, stand as mute witnesses in defendant's favor; yes mute, so far as speech may go, but forceful and convincing and effective to overthrow the statements of plaintiff's witnesses. This defendant was seduced by plaintiff; she trusted to him and married him. He turned from her and made a mockery of all her hopes and spat upon his marriage vows."

When witnesses are of such low character and degree as described by the trial judge, and are inconsistent in their testimony, and some facts related improbable of occurrence, and the appearance and conduct of defendant and the attendant circumstances of the trial are such as to contradict their statement, and he says on his conscience he can not believe them, we will accept his conclusion and affirm the judgment.

Judgment affirmed.

NICHOLLS, C. J., absent.

 No. 11,842.

H. B. CLAFLIN & CO. VS. SAM BENJAMIN ET ALS.

In a suit by a creditor to annul an attachment against his debtor by a prior attaching creditor, he is restricted to the proof of fraud and collusion between the attaching creditor and the debtor.

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A PPEAL from the First Judicial District Court for the Parish of Caldo. *Taylor, J.*

Wise & Herndon for First National Bank, Defendant, Appellee.

A. H. Leonard and *F. G. Thatcher* for Plaintiffs and Appellants, for a Rehearing.

The opinion of your Honors holds that a sale of property attached made *pendente lite* may be made for two-thirds of its appraised value, under provisions of Art. 680, C. P. We respectfully submit this is error.

Property which has been attached, and which is perishable in its nature, may be sold under Art. 261, C. P., but such sale is not an execution sale and is not governed by Art. 680 C. P., which relates to sales made under execution. This court so held in 26 An. 271.

Clafin & Co. vs. Benjamin et al.

Argued and submitted June 10, 1895.

Opinion handed down June 21, 1895.

Rehearing refused June 27, 1895.

The opinion of the court was delivered by

MCENERY, J. The plaintiffs obtained a judgment against the defendant for four thousand and nine hundred dollars. In the suits, writs of attachment issued and certain property was attached. Claiming that the attachment gives them a lien and privilege on the property seized, under the writs, this suit is brought to annul a prior attachment upon the property by the First National Bank of Shreveport.

There was judgment for the defendants and the plaintiffs appealed.

The grounds annulling the judgment sustaining the attachment are:

1. Because the bank being a corporation can not and did not take the oath which is a preliminary requisite to the issuance of a writ of attachment, and the bank being present within the jurisdiction of the court, such oath could not be taken by any agent or attorney at the bank.

2. That the affidavit for attachment was made by W. B. Jacobs and does not show nor does it appear by record that he was authorized to make same. That in fact and in law said W. B. Jacobs was not authorized to make said affidavit for said bank.

3. Because the institution of the said suit of said bank against said Benjamin was not authorized by any resolution properly adopted by the directors of the bank, nor was the execution of any attachment bond so authorized.

4. Because the issuance of a writ of attachment against Benjamin was not necessary to protect any rights of the bank.

5. Because, as hereinbefore set forth, the suing out of such attachment in the name of said bank was fraudulent and collusive.

The plaintiffs can not urge the first, second and third grounds, as they are defences personal to the defendant in attachment. This is elementary. *Commission Company vs. Bond & Williams*, 44 An. 841.

The plaintiffs are restricted to the fifth ground, that the attachment was fraudulent and collusive. *Rawlins vs. Sheriff*, 45 An. 69; *John Henry Shoe Company vs. Gilkerson-Sloss Commission Company*, *Ante* 860.

The fourth ground is a matter of proof as a circumstance to show collusion.

The "fraudulent collusion" alleged is that the defendant, Benjamin, was engaged in business with a stock of goods placed on the assessment rolls for twenty-five hundred dollars; that the defendant bank gave him letters of introduction asserting that his credit was good, and encouraged and aided him in largely increasing his stock of merchandise; that the bank and Benjamin had agreed before the purchases were made, that on a certain day or about a certain time the bank would, with his consent, attach his property on an alleged indebtedness and sell the property in block for the benefit of Benjamin and certain other of his creditors, to whom he intended to give a preference. The charges are so serious that they have necessarily compelled an examination of the record with the most searching investigation.

The defendants used as witnesses by the plaintiffs deny the allegations, and we find nothing in the record to sustain the accusation of collusion.

It is true defendant Benjamin made no defence to the attachment, but the bank's debt existed, and the facts upon which the attachment were based also existed. Plaintiffs alleged the same reasons for the attachment sued out by them. At any rate, without proof of an agreement to attach on fictitious grounds, consented by the attached creditor, the inquiry into the facts upon which the attachment issued is closed by the decree in the attachment suit. *Rawlins vs. Sheriff*, 45 An. 89.

The letters of recommendation, or of introduction, were justified by the reputation the defendant Benjamin enjoyed in the city of Shreveport when they were issued. Benjamin purchased more goods than he ought to have carried, but it is not shown that the defendant bank had anything to do with his purchases. The relation between him and his attorney Kahn, his abruptly leaving the gaming table when he heard that plaintiffs' agent was in Shreveport, and taking measures to protect himself, and his course in invoking attachments against him to forestall that of the plaintiffs; his declaration as to protecting home creditors, and fixing himself, are matters personal to his own interest and affect them alone, but can not affect the bank without proof connecting it with them. The fact is,

Clafin & Co. vs. Benjamin et al.

the bank had an honest debt against Benjamin, and the attachment was an honest effort to secure it.

There was a scramble among creditors to be the first to secure a lien by the attachment. The plaintiffs have shown that there were rumors several days before the attachments issued, that defendants' property would be seized. As usual, there was a movement among creditors and a rivalry among attorneys to secure their claims. In such a race it is not unusual for the nearest attorney to be unemployed, nor is it usual for the chance meeting of creditors and attorneys, who had been before the attorney for the seized debtor, at an early hour at the clerk's office.

The sale by Jacobs, the purchases at the sheriff's sale, of the bulk of the property and its final disposition to Mrs. Benjamin, the mother of the defendant, is complained of. But the record shows that the agent of the plaintiffs, whose visit, it appears, to Shreveport was for the purpose of attaching Benjamin, made a proposition to him for Clafin & Co. to do practically the same thing; that is, purchase the property for Benjamin, place him in possession of it, provided the attaching creditors could be satisfied. It appears that no consent was given to this arrangement. They bid at the sale of the property attached under the writs of attachment. They intervened in all the attachment suits and failed to prosecute their interventions. In the interventions, the allegations made in this suit are the same.

Mrs. Benjamin realized nothing under her attachment, and in this particular the plaintiff was not injured.

The property was purchased by Jacobs and adjudicated to him, as appears by the sheriff's return. He could do with it as he pleased, give it or sell it to Mrs. Benjamin; consequently it is immaterial, so far as plaintiffs are concerned, in what manner she paid the price.

Complaint is made that the property was sold for two-thirds of its appraised value. This was in accordance with law. C. P. 680. But we are of the opinion that the appearance of plaintiffs by their agent at the sale, and bidding on the attached property, cured any defects in the regularity of the sale, if there were any.

Considering all the facts and circumstances presented in this case, we think the plaintiffs have failed to prove the allegations in their petition.

Judgment affirmed.

NICHOLLS, C. J., absent.

Succession of Bonzano.

No. 11,828.

SUCCESSION OF M. F. BONZANO.

The attorney of the heir seeking to be appointed administrator is not to be paid by the succession, when the deceased has left a will appointing executors to whom, notwithstanding the opposition of the heir, letters issue. 10 Rob. 541; 27 An. 412; 36 An. 304.

A PPEAL from the Twenty-second Judicial District Court for the Parish of St. Bernard. *Livaudais, J.*

H. Heidenhain and Dinkelspiel & Hart for Executors and Heirs, Appellees.

Sambola & Ducros for Opponents, Appellants.

Submitted on briefs May 27, 1895.

Opinion handed down June 24, 1895.

The opinion of the court was delivered by

MILLER, J. This appeal is from the judgment dismissing the opposition of the appellants, claiming to be placed on the tableau of distribution in this succession for one thousand dollars for professional services.

The deceased, M. F. Bonzano, left a will appointing executors who presented it for probate to the Civil District Court, instead of to the District Court of the domicile of the deceased, the parish of St. Bernard. The will stated that domicile. In a day or two after the probate by the Civil District Court, the executors, realizing their mistake, had the probate here revoked and asked for the probate in St. Bernard. But they encountered opposition from one of the legal heirs, claiming, in a petition filed previous to the application of the executors, letters of administration. This application for letters by the heir was filed after the probate of the will, by the wrong court, it is true, but notice to all that the deceased had left a will and appointed executors. The St. Bernard court, as might be expected, refused the application of the heir, probated the will, and issued letters to the executors. The attorney for the heir now claims they should be paid by the succession for their services in conducting the proceedings to have an administrator appointed.

 Succession of Rabasse.

It is claimed by the opponents their proceedings were beneficial to the succession. We can not appreciate the basis for the claim.

The proceedings were in opposition to the will and obstructed its probate. The statement is in the record the opponents were retained with a view to contest the will. When an attorney is employed for one claiming the administration of a succession, and who fails to maintain his claim, the attorney has no claim on the succession for his fee. Succession of Gourjon, 10 Rob. 541; Wailes and Mathews vs. Succession of Brown, 27 An. 411; Succession of Florance, 36 An. 304. In some cases courts have allowed fees for administrations displaced afterward by the executor or heir, or universal legatee. Thus, in one case, the appointment of the administrator seems to have been necessary, and attorney's fees and commission were allowed for an administration until the legatee appeared and was put in possession; in another, such fees and commissions were allowed one who was appointed to act as executor in case of the absence of another. Succession of McLaughlin, 14 An. 398; Succession of Florance, 36 An. 304. In this case there was no necessity for any appointment as administrator; none was appointed, and there was no occasion for the proceedings of the heir, unless for his own interest. The claim of the attorney is against the heir, not the succession.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

NICHOLLS, C. J., absent.

No. 11,818.

SUCCESSION OF DR. EUGENE RABASSE.

ON INTERVENTION AND OPPOSITION OF THE DELEGATE FOR THE
CONSUL OF FRANCE.

The provision in our treaty with France, adopting that in our treaty with Belgium, conferring on the delegate appointed by the French consul authority to represent, until they send their powers, French citizens, heirs of a succession opened here, is a provision relating to a subject within the treaty-making power, and must prevail if in conflict with a State law. Constitution United States, Art. 6, par. 2; 1 Kent's Com. 165; Ware vs. Hilton, 8 Dallas, 109; Provost vs. Grenaux, 19 How. 1; 100 U. S. 483; 133 U. S. 264, 266; Treaty with France, 1838, 10 Stat. 999, Sec. 12; Treaty with Belgium of 1890, Art. XV.

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Succession of Rabasse.

The effect of such provision is to remove any necessity for the appointment by our courts of an attorney to represent such French heirs, and to that extent all that the case requires to be determined, the provision is maintained. See Civil Code, Art. 1210; 18 La. 73; 15 La. 527.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

J. Numa Augustin for Delegate, etc., Intervenor and Third Opponent, Appellant.

Theodule Buisson, Chrétien & Suthon, Attorneys for absent heirs, Appellees.

Argued and submitted May 24, 1895.

Opinion handed down June 3, 1895.

Opinion refusing rehearing June 29, 1895.

Adolphe Auguste Rabasse, commonly known as Dr. Eugene Rabasse, a native of France, died February 26, 1895, in the city of New Orleans. At the time of his death the deceased was a citizen of the Republic of France; he died unmarried and left no legitimate ascendants nor descendants, leaving only collateral relatives, consisting (1) of his niece, residing at Chaumont (Haute Marne), France; and (2) Mrs. Blanche Louisa Langlois, wife of Louis Jean Joseph Moisson, residing at Brienne le Chateau (Aube), and Mrs. Clarie Louise Armelle Langlois, wife of Charles Martial Pincant, residing at Lesmonts (Aube), France, his grandnieces.

The deceased left a will wherein, with the exception of a legacy made to one Eugene Rabasse, he wills the residue of his estate in equal shares to his two sisters, Mesdames Saulnier and Collot. Both of these having departed this life, their children and grandchildren inherit by representation. Mrs. Saulnier died without issue.

The succession of Dr. Eugene Rabasse was opened in the Civil District Court for the parish of Orleans on the 27th day of February, 1895, by Armand Bossu, mandatory of Mrs. Hypolite Bossu, one of the heirs herein, claiming the administratorship. He was subsequently appointed dative executor.

Mesdames Moisson and Pincant, born Langlois, French citizens re-

Succession of Rabasse.

siding in France, were not represented by mandatories or representatives of their own selection.

Under the circumstances, intervenor, as delegate of the consul of the French Republic, filed a petition of intervention and opposition, claiming as a matter of right to represent the said absent heirs, Mesdames Moisson and Pincaut.

The judge *a quo* dismissed this intervention and opposition, from which judgment this appeal was taken.

The opinion of the court was delivered by

MILLER, J. The deceased, a resident of New Orleans, left heirs residing in France. Our treaty with that country provides in case of death of any citizen of France in the United States, without any testamentary executor by him appointed, the consul shall have the right to appear, personally or by delegate, in all proceedings on behalf of the absent or minor heirs. The stipulation is reciprocal, applying to estates of Americans dying in France. The French consul here appointed a delegate to represent the French heirs, and he applied for recognition to the Civil District Court, in which the succession was being administered. That court denied the application and appointed an attorney for the absent heirs. From the judgment dismissing the intervention of the appellant, claiming recognition as delegate, he prosecutes this appeal.

There is a motion to dismiss the appeal on the ground there is no pecuniary interest involved. There is involved a question of the construction and the execution of our treaty with France in respect to the interest of French heirs in a succession of over one hundred thousand dollars. The motion is denied.

If the treaty is susceptible of the construction of the appellant the result would be to avoid the appointment of the attorney for the absent heirs, and require the recognition of the appellant as the delegate of the French consul. In our view the stipulation in this treaty puts the delegate in the position of an agent of the French heirs, with the same effect as if he held their mandate to represent them as heirs. That was the manifest purpose, and the language of the treaty plainly expresses that intention. There is no power to appoint an attorney for absent heirs when the heirs are present or represented. Civil Code, Art. 1210; *Robouam's Heirs vs. Robouam's*

Darrall vs. Railroad Co.

Executor, 12 La. 78; Addison vs. New Orleans Savings Bank, 15 La. 527.

It is idle to call in question the competency of the treaty-making power, nor do we think any question can be raised that the subject of this treaty under discussion here is properly within the scope of the power. That subject is the rights of French subjects to be represented here by the consul of their country. On that subject the treaty provision is plain. The treaty by the organic law is the supreme law of the land, binding all courts, State and Federal. Constitution United States, Art. 6, par. 2; 1 Kent's Commentaries, 165; Ware vs. Hylton, 3 Dallas, 197; 19 How. 1; 100 U. S. 483, 488; 183 U. S. 264, 266; Treaty with France, 1853, 10 Stats. 999, Sec. 12; Treaty with Belgium, 1880, Art. XV.

The treaty discloses no purpose to require our courts to appoint as the attorney for absent heirs the delegate of the French consul. Its purpose is accomplished by placing the delegate before the court as representing the absent heirs, and precluding the appointment of any attorney to represent them.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, dismissing the intervention of the delegate of the French consul, be avoided and reversed, and it is now ordered, adjudged and decreed that said delegate be recognized and as such delegate, authorized to represent the absent heirs in this succession, and that the succession pay the costs.

ON APPLICATION FOR REHEARING.

Our decision in this case affirms that the French heirs of this succession are to be deemed represented by the delegate of the French consul, with the same effect as if the delegate held their power. This view of the treaty, to which our decision is confined, displaces the power of the lower court (exerted in ordinary cases) to appoint any attorney to represent the French heirs of this succession.

The rehearing is refused.

No. 11,809.

C. B. DARRALL VS. SOUTHERN PACIFIC COMPANY.

The railroad company placing piles in navigable waters to protect the bridge laid under legislative authority must use all necessary protections for the security of commerce, and if, because precautions are not used, a vessel is lost

47	1455
48	399
47	1455
115	6
115	7

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or injured by contact with the pile structures, the company will be responsible. Wood on Nuisances, 5472; 126 U. S. 260; 6 McLean, 70.

The limited liability legislation under certain modifications exempts carriers by water from responsibility from losses due to perils of navigation or any want of care in the management of vessels and incurred without the privity or negligence of the carrier, but extends no protection against a loss caused by the contact of the vessel with the pile structure placed by the carrier in navigable waters without due precautions to guard against accidents. Revised Statutes of the United States, Sec. 4282 *et seq.*; 24 Statutes, 81; 27 Statutes, 445.

Nor does the Code or any stipulation in the bill of lading furnish the carrier any protection against such losses. Civil Code, Arts. 2751-2794; Wheeler on Carriers, Sec. 81 *et seq.*; 17 Wallace, 361.

A PPEAL from the Civil District Court for the Parish of Orleans.
Theard, J.

Rouse & Grant for Plaintiff, Appellant.

Leovy & Blair for Defendant, Appellee.

Argued and submitted May 22, 1895.

Opinion handed down June 3, 1895.

Opinion refusing rehearing June 29, 1895.

The opinion of the court was delivered by

MILLER, J. The plaintiff seeks to make defendant liable for the value of his sugar on board of a barge sunk with its cargo, by coming in contact with a cluster of piles or fenders placed by defendants in Berwick's Bay to protect the railroad bridge of defendants, constructed across the bay near the place of the loss.

The sugar was intended for transportation on the railroad, and the barge was used by the defendants to convey the sugar from plaintiff's plantation to the bay, to be placed on defendant's cars. The petition charges the cluster of piles to be an unlawful obstruction to navigation, constructed so as to be dangerous to vessels, the cause of the loss, and hence that defendants are responsible. The defence is that this fender or cluster was necessary to protect the railroad bridge from the strong current and drift wood which, but for the fender, would form rafts, sweep with violence against the bridge; that the bridge was laid across the bay under the authority of a legislative act, and that the cluster or fender as a protection to the

bridge was within the scope of this legislative authority. The answer also avers the method of barge transportation of the sugar to the railroad was proper, charges the loss was due to a peril of navigation, not to the fault or negligence of defendants' employees. The answer invokes the benefit of the stipulation in the bill of lading, given for the sugar, exempting defendants from all responsibility, and the defendants, it is claimed, are besides protected from liability, the legislation of Congress limiting responsibility of owners of ships, barges and vessels engaged in navigation. From a judgment against him plaintiff prosecutes this appeal.

Under the legislative act, the defendants laid their bridge from the eastern to the western side of Berwick's Bay (Act No. 37 of 1877), locating the draw nearer the western side to avoid the deeper water and stronger current of the mid-channel, the draw occupying a space of over one hundred feet. There is piling faced with boards placed at some distance from the bridge piers, and extending about one hundred and fifty feet up on the western side of the bay; on the other or eastern side of the bay, on a line with the bridge piers or current line, is a cluster of eight piles, extending up, with cribbing between them, to prevent obstructions; the piles are braced with stringers tied with heavy iron plates, and the ends of the braces or stringers project beyond the piles, in order, it is testified, to take the bolts. These piles on the eastern side, we gather from the testimony, are not boarded so as to make a board fender, as on the western side. This cluster or fender of eight piles begins twenty-two feet from the bridge and extends twenty-one feet up the bay. The board fender on the western side and the pile cluster on the east side thus form the entrance through which vessels pass to go through the draw. It is in evidence the board fender is not parallel to the current but extends at an angle from the bank. The current runs obliquely across the entrance directly toward the piling on the eastern side. This piling, it is in evidence, diminishes the room the boat would otherwise have to "swing" into the draw, and subjects the vessel to the necessity of turning and going through the draw obliquely instead of a straight direction. In adapting the boat to this oblique course, requiring backingsometimes, the current is apt to carry the boat on the pile cluster on the east side and on the projecting ends of the stringer in the position to strike and penetrate the hull. It was one of these stringers that pierced the barge about twenty-

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five feet from the bow and caused the loss of the barge and plaintiff's sugar.

We do not find it necessary to discuss the question whether the act of 1877 authorizes the piling in the bay or the question of the necessity of thus protecting the bridge. In any view of the authority conferred, it was certainly imperative on defendants in piling the bay, to use all precautions for the security of vessels. Wood on Nuisances, Secs. 472, 478. We think in view of the course vessels were obliged to adopt in approaching the draw, and the current to which they were exposed setting toward the east piling, it was the dictate of prudence to cover the ends of the stringers of this east side piling or adopt some other method of protecting vessels from that danger that proved fatal to the barge. On the one side there was a board protection, against which if a vessel struck it glanced, and there was no damage; on the other, where the danger was greater, there were the naked protruding heavy stringers to receive and destroy any vessel drifted on them by wind or current.

We have given due weight to the testimony why the boarding on the one side was not used as a protection on the other, but it is our conclusion that some precaution should have been employed against a peril so obvious in its character. On this question we are, of course, influenced by the testimony of a number of pilots and others familiar with the subject. One describes the process by which vessels were constrained to go through the draw; that is, the boat had to be laid diagonally across the current to go through; when the current was strong had to "back up" and flank to go through. "If the boat runs through without backing, have to go diagonally to open the bridge." Another witness, a master navigating the bay for eight years and thoroughly familiar with the locality and of the method of going through the draw, compulsory in all by the current, the position and construction of the piling, testifies: "The piling on the upper side is forty-five feet above the draw; it is a fender to protect the bridge; is dangerous; a boat always hits it; it is braced with stringers projecting eight or ten inches beyond it, and a boat going down strikes the stringers instead of the piling, which will penetrate the hull unless she has guards; all the trouble is in these braces; if they were protected the vessel would strike and glance off; the cluster makes navigation dangerous." Another witness, a pilot for eleven years in the bay, testified: "There is a boarded fen-

der, one hundred and fifty feet long, on the west side, not parallel with trend of current, extends at an angle from instead of curving to the bank, causes current and obstructs navigation to extent of one-third of opening; on the east side is a clump of piling, eight strapped together, with iron at top, with each being bolted at water's edge, is placed directly in trend of current; is an obstruction because west bank fender extends into instead of opening out to current; the cribbing is treacherous, sometimes below water line; in clearing end of west bank fender a boat is brought directly in trend of current, carrying it directly on piling; danger also results from large bolts, owing to wear of cribbing left projecting." Another testified, a pilot of fourteen years' experience: "The piling is well strapped with iron and cross timbers, which makes it dangerous for any barge or other boat to strike it. The current runs obliquely across the entrance to the draw. The piling is especially an obstruction to towing barges. It is situated about forty feet from the bridge, and cuts off the room a boat would otherwise have to swing into the opening. The current runs directly toward the piling, the timbers of which stick out from it at the water's edge, and would penetrate any boat striking them. The passage should never be attempted at night." *William H. Cisna* says he has been a master and pilot for nine years in these waters. "The trend of the current is toward the east. If a boat were to strike the piling it would prove fatal to her, because of the bolts and other projections sticking out, below the water. If it were not for the piling a boat could drive straight through the draw with a tow, but as it is now a boat has to turn and go through obliquely. If there were no projections a boat might strike the piling without injury, but as it is now the least blow against the piling is apt to be fatal." *R. N. Hamilton* a master and pilot of seven years' experience, says the piling is undoubtedly an obstruction. "This is due to the position of the west bank fender, with reference to the trend of the current, which strikes it at an angle, which compels a boat to go into the draw obliquely—that is, with her head toward the west bank. Even in this position the boat flanks so that she has to be swung quickly to the port when in about the middle of the draw, to prevent her striking the piling on the east side. If a boat strikes the piling she is almost sure to go down, because of the rugged spikes or bolts stick-

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ing out. Everything that has ever been sunk has been sunk on this piling."

In answer to this testimony, it is urged that there have been in years only two or three boats lost on this piling. That illustrates, we think, good fortune, and the good care exerted by barge men and pilots. But it is none the less true that the danger depicted by the witnesses existed and proved effective to cause the loss in this case. We think if the navigation of public waters is made dangerous by the omission of reasonable precautions on the part of those authorized to construct a bridge over such waters, the law places the responsibility for the resulting accidents to vessels on the bridge owners, unless they can refer the loss to some cause other than the perils they create. We find a case illustrating this liability in 6 McLean, 70.

The defendants have offered testimony to show that if the piles had not been in the way the barge would have struck the bridge. It might have been so, but we can not, on that assumption, relieve defendants from liability. The piles begin some distance from the bridge. That obstruction against which the barge struck can not be put out of view and another cause of loss, *i. e.*, the bridge forty-three feet away, substituted, on the theory it would have intervened and proved equally fatal.

The defendants, as carriers of the sugar from plaintiff's plantation to the railroad, have invoked the protection of the limited liability legislation of Congress. Revised Statutes of the United States, Sec. 4282 *et seq.*; Acts of 1886, 24 Statutes at Large, p. 81; Acts of 1893, 27 Statutes at Large, p. 445. If it be conceded barges are within the scope of these acts, it is difficult to make their application to this case. The loss is not charged to any neglect or want of care of those on the barge or the steamer. That issue is not in the case, but eliminated by pleadings and proof. The master of the steamer testifying, attributes the loss to wind, or the current bearing the barge on the pile cluster. His testimony makes more conspicuous the danger to navigation arising from piles, with projecting stringers to pierce the sides of vessels, placed by the defendants in the current, which, by reason of the constructions of defendants, all vessels, to pass through the draw, had to encounter, bearing them directly on these dangerous and, in this instance, fatal stringers. Neither wind nor current could have produced any loss in this case, if this pile cluster, with its projecting points, had not been in position, against which no vessel,

according to the testimony, was safe, if drifted on them. The loss then, can not be referred to the perils of navigation in the sense of the limited liability act, unless we are to understand the term as including the danger produced by defendant; nor can the loss be attributed to the fault or want of care, neither alleged nor proved, of those in charge of the barge or steamer. The limited liability legislation protects owners of vessels against losses from the irresistible violence of the winds and waves, or arising from any want of care, without the design, privity or neglect of the owner, or those in charge of vessels. In our view the legislation has no applicability in this case of loss due to the method in which the defendants constructed the pile cluster, placed by them in the bay and endangering its navigation.

Our Code does not impose on carriers the responsibility incident to the relation under the common law. Civil Code, Arts. 2751, 2794. It is insisted the Code is to be the test of the liability of the depth. But we do not understand that the Code has any tendency to relieve the carrier, if the loss is due to his act in placing obstructions in rivers or waters without the care requisite to guard against accidents. On this same line of defence we are referred to the stipulations in the bill of lading furnished by the carrier to plaintiff. That the carrier may, under certain restrictions, modify his liability is undoubted. It is hardly necessary to go into that discussion. The whole subject, with all of its qualifications, has undergone careful examination. See Wheeler on the Law of Carriers, p. 81; Railroad vs. Lockwood, 17 Wallace, 361. But it is presumed it will be accepted no stipulation will avail against a loss due to the negligence or imprudence of the carrier, or, in other words, he can not stipulate against a peril produced by himself. We have considered, too, the defence that the plaintiff was familiar with the mode of transportation and took all risks. We think it a more reasonable conclusion that he supposed defendants assumed the risks arising from the position on which they chose to place the pile cluster and its method of construction disclosed by the record. The assumption of such risks, if even known to plaintiff, would, it seems to us, require express proof.

We have given careful attention to this contention in all its phases. Some of these pressed by plaintiff have been passed over. Assuming that these pile structures are authorized under the legis-

Darrall vs. Railroad Co.

lative act as necessary to the bridge itself, notwithstanding the strict construction such acts usually receive (see 125 U. S. 26), it seems to us beyond dispute that the obligation of careful location and construction in respect to their structures was on the defendants. Guided by the testimony, we are led to the conclusion the mode of construction of the structures was dangerous and caused the loss. This phase we encounter at every turn of the case, and controls the decision.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and it is now ordered, adjudged and decreed that plaintiff recover from defendant the amount claimed in the petition, two thousand eight hundred and sixty-eight dollars, with legal interest and costs.

MR. JUSTICE BREAUX concurs in the decree.

ON APPLICATION FOR REHEARING.

WATKINS, J. Plaintiff's sugar was being transported from his plantation down the Teche to Morgan City for shipment by defendant's train to New Orleans, and, by the wind and current, the barge in which same was being conveyed was driven against a cluster of piles which had been placed by the defendant in the Atchafalaya Bay as a protection to its bridge, and sunk, and the cargo of sugar lost.

The dispute is chiefly between pilots and other people, who have been engaged for many years in the navigation of the bay, and expert bridge builders and civil engineers—"the bone of contention" being the possibility or impossibility of this cluster of piles being dispensed with.

That it is a peril to navigation all agree.

The theory of our opinion favors that of the river people, and holds the defendant responsible on account of its want of due care in the location and construction of the protection for its bridge.

There is no doubt as to the fact that the defendant had legislative authority to construct a railroad bridge across the Atchafalaya Bay at Morgan City, and to construct and maintain a fender-pier for its safety and protection, but no fair and reasonable construction can be placed upon this grant which would allow the defendant to obstruct or imperil navigation.

That the Atchafalaya Bay is for the greater part of the time exclusively tide-water is a fact within the judicial cognizance of this court,

Goldman vs. Goldman & Masur.

and to us it does not seem impossible to resist the accumulation of water which is occasioned by the annual swells of the Mississippi river and its tributaries and render ineffectual, boarded or covered, fender-piers which would protect vessels and guide them through the draw of the defendant's bridge in safety. We can see no reason why the cluster of piles, as it now stands, could not be so boarded as to protect vessels from danger, instead of permitting the stringers to protrude in such way as to cause such an accident as the plaintiff, very justly, complains of.

Rehearing refused.

No. 11,850.

L. H. GOLDMAN VS. GOLDMAN & MASUR.

The fact that the debt secured by privilege is unpaid, and that the debtor is disposing of the property on which the privilege exists, though in the usual course of business, will authorize the writ of sequestration. Code of Practice, Art. 275, as amended; 8 An. 366; 36 An. 487; 40 An. 825.

Under the Act No. 146 of 1894, providing an additional judge for the Fifth Judicial District, it is competent for the additional judge to recuse himself, the cause existing, and to appoint a judge *ad hoc* to try the case.

Nor will the defendant be allowed to question the capacity of the judge *ad hoc*, on the alleged ground of the ability, to try the case, of the judge of the district in whose aid the Legislature provided the additional judge; that act leaving it to the two judges "to arrange the judicial work between themselves," and besides the bill of exceptions showing the physical inability of the judge of the district to act.

The demand based on a penal clause for the payment on a condition of the amount specified can not be pleaded in compensation against a promissory note. Civil Code, Arts. 2117, 2525, 2527, 2209; 7 N. S. 517; 5 An. 303; 2 H. D. 254, No. 5.

The judgment may be corrected before signature, to correct a trivial error as to amount, such an amendment not being one of substance. Code of Practice, Art. 547.

A PPEAL from the Fifth Judicial District Court for the Parish of Ouachita. *Benton, J., ad hoc.*

F. G. Hudson for Plaintiff, Appellee.

Gunby & Sholars for Defendants, Appellants.

Argued and submitted June 12, 1895.

Opinion handed down June 21, 1895.

Rehearing refused June 29, 1895.

47	1463
51	787
51	768
51	776
51	777
47	1463
52	28
52	447

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of enforcement at all, the amount is modified in case of the partial execution of the principal obligations. The plaintiff denies any violation of the agreement in aid of which the penalty was stipulated, or if any, insists it was but partial and inconsiderable. The demand in compensation must be fixed, "equally liquidated and demandable," as the Code puts it. We think it clear that the demand on a penal clause, unliquidated and undisputed, can not be pleaded in compensation against a promissory note. This view disposes of the question of tender, one of the defences. C. C., Art. 2209; *Lacoste vs. Bordere et al.*, 7 N. S. 517; *Pi vs. Vidal*, 5 An. 303. Nor do we think, with due regard to the rights of plaintiff, apprised by the pleadings that he was to meet a plea in compensation admitting of a complete legal defence, that we can deal with the plea as one in reconvention. The lower court has reserved defendant's rights under the penal obligation, and this, in our view, is all to which defendant is entitled.

The judgment in this case allowed ten per cent. on the amount recovered, of which defendant complained, but that stipulation was in the contract.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed, with costs.

NICHOLLS, C. J., absent.

 No. 11,845.

A. BALDWIN VS. JOHN S. YOUNG, SHERIFF, ET ALS.

The vendor under a sale conditioned that the property shall be his until payment of the price does not lose the right thus reserved, because the purchaser for the service and improvement of a building places such property therein, and against the creditor of the purchaser with a mortgage on the building the unpaid vendor may enforce his right to remove the property sold. *Lapene vs. McCan*, 28 An. 749; *Carlin vs. Gordy*, 32 An. 1285; 31 An. 735; 1 *Troplong Priv. et H; potheques* No. 113, p. 798.

A PPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

F. G. Thatcher and Alexander & Blanchard for Plaintiff, Appellant.

Wise & Herndon for Defendants, Appellees.

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48 1495
49 125
47 1466
107 709
107 713
47 1466
e121 155

Argued and submitted June 11, 1895.

Opinion handed down June 17, 1895.

Opinion refusing rehearing June 29, 1895.

The opinion of the court was delivered by

MILLER, J. The plaintiff seeks to enjoin the removal of a heater and its attachments in a building acquired by him at the sheriff's sale under a mortgage of plaintiff on the property, i. e., building and ground. The plaintiff's position is, the heating apparatus for heating the building, used as a seminary, was placed in it by the owner for its service and improvement, thereby became part of the immovable, was covered by the mortgage, and passed to the plaintiff under the purchase by him at the sheriff's sale. The heater and attachments were sold to the owner of the building, never paid for, and under a contract that, until paid for, the vendor should be the owner of the property sold. The vendor obtained judgment against the owner for the unpaid price, with the right to remove the property sold, unless payment of the price was made by a given time. It is the removal under that judgment plaintiff enjoins. The argument on behalf of the unpaid vendor is, that his conditional sale did not divest him of ownership, nor was his right impaired because the purchaser chose to put the property in a building covered then or thereafter by a mortgage, and it is urged that the price being unpaid the vendor can enforce against the mortgage creditor the right to remove the property as decreed in the suit of the vendor against the owner. The judgment of the lower court sustained the vendor and plaintiff, the mortgage creditor, appeals.

The question here, in a varied form, has been the subject of previous adjudications. It is familiar that our law makes part of the immovable, things that have been added by the owner for the improvement and service of the property. Hence the mortgage of the immovable covers not only the soil, the building, but the appurtenances designated by the Code. So the sale of the immovable carries the immovable in the sense of the Code. Things the owner has placed on the immovable for its service and improvement become immovable by destination, is the textual declaration made plainer by the illustration in the Code, of cattle intended for cultivation, implements of husbandry, seeds, beehives, mills, kettles and

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of enforcement at all, the amount is modified in case of execution of the principal obligations. The plaintiff denials the agreement in aid of which the penalty or if any, insists it was but partial and inconsiderable in compensation must be fixed, "equally liquidable," as the Code puts it. We think it clear that the penal clause, unliquidated and undisputed, compensation against a promissory note. The question of tender, one of the defences. *vs. Bordere et al.*, 7 N. S. 517; *Pi vs. Vi*. We think, with due regard to the rights pleadings that he was to meet a plea in complete legal defence, that we can convention. The lower court has reversed the penal obligation, and this, in is entitled.

The judgment in this case recovered, of which defendants in the contract.

It is therefore ordered of the lower court be affirmed.

NICHOLLS, C. J., ab

A. B.

The vendor of the privilege on the thing sold. Civil Code, Art. 3227; again, Art. 176. It is difficult to see in the light of the proposed Constitution that the privilege can be defeated by the purchaser makes of the thing sold. There is a decision in 1857 that the privilege must be recorded to avail if the thing sold has been incorporated with so as to become part of the immovable. The decision has no support in the French authorities, nor in the later adjudications of this court, and where they deal with registry at all it is because the Constitution in existence required all privileges to be recorded. *Gary vs. Burgulieres*, 12 An. 227; Constitution 1868, Art. 123. In this case it is not his privilege for the price on which

47 1466
48 1495
49 125

47 1466
107 709
107 713

47 1466
121 155

Baldwin vs. Sheriff et als.

Argued and submitted June 11, 1895.

Opinion handed down June 17, 1895.

Opinion refusing rehearing June 29, 1895.

The opinion of the court was delivered by

MILLER, J. The plaintiff seeks to enjoin the removal of a heater and its attachments in a building acquired by him at the sheriff's sale under a mortgage of plaintiff on the property, *i. e.*, building and ground. The plaintiff's position is, the heating apparatus for heating the building, used as a seminary, was placed in it by the owner for its service and improvement, thereby became part of the immovable, was covered by the mortgage, and passed to the plaintiff under the purchase by him at the sheriff's sale. The heater and attachments were sold to the owner of the building, never paid for, and under a contract that, until paid for, the vendor should be the owner of the property sold. The vendor obtained judgment against the owner for the unpaid price, with the right to remove the property sold, unless payment of the price was made by a given time. It is the removal under that judgment plaintiff enjoins. The argument on behalf of the unpaid vendor is, that his conditional sale did not divest him of ownership, nor was his right impaired because the purchaser chose to put the property in a building covered then or thereafter by a mortgage, and it is urged that the price being unpaid the vendor can enforce against the mortgage creditor the right to remove the property as decreed in the suit of the vendor against the owner. The judgment of the lower court sustained the vendor and plaintiff, the mortgage creditor, appeals.

The question here, in a varied form, has been the subject of previous adjudications. It is familiar that our law makes part of the immovable, things that have been added by the owner for the improvement and service of the property. Hence the mortgage of the immovable covers not only the soil, the building, but the appurtenances designated by the Code. So the sale of the immovable carries the immovable in the sense of the Code. Things the owner has placed on the immovable for its service and improvement become immovable by destination, is the textual declaration made plainer by the illustration in the Code, of cattle intended for cultivation, implements of husbandry, seeds, beehives, mills, kettles and

Baldwin vs. Sheriff et als.

machinery, and the Code adds all movables attached to the building by the owner with plaster or mortar not capable of being detached without breaking or injuring the building. Civil Code, Arts. 462, 463, 467, 468, 469; Lucas vs. Brooks, 23 An. 117; Theurer vs. Nautre, 23 An. 749; Pohlman vs. De Bouchel, 32 An. 1158; Weil vs. Lapeyre, 38 An. 303; Rochereau vs. Bobb, 27 An. 657. The principle that movables added to the immovable for its improvement, while inflexibly applied as between the owner and his vendee or mortgagee, is yet subject to well-defined exceptions. The Code itself recognizes the right of the third person to remove or claim compensation for his works or constructions on the immovable of another, yet if made by the owner the improvements would undoubtedly be subject to any mortgage by him on the immovable. Civil Code, Arts. 506, 507. So the privilege accorded by law to the vendor of movables still subsists though the movables are attached by the purchaser to the immovable, and will be enforced against the mortgage creditor. The French commentators state the law by a commonplace illustration: the workman sells the farmer a tub which he places on his farm for its improvement; the tub thus becomes part of the immovable, but shall this change deprive the workman of his privilege? The commentators answer in the negative and affirm until paid for, the vendor notwithstanding the change preserves *un droit réel* on the article sold. 1 Troplong Priv. and Hypoth. No. 113; Lapene vs. McCan, 28 An. 749; Hall vs. Wyche, 31 An. 735; Carlin vs. Gordy, 32 An. 1285. The authorities, we think, sustain the right of the unpaid vendor to enforce his privilege on the movable sold, although by the act of the purchaser it has become part of the immovable.

The vendor of a movable is apprised by law that without registry he preserves a privilege on the thing sold. Civil Code, Art. 3227; Constitution, Art. 176. It is difficult to see in the light of the provision in the Constitution that the privilege can be defeated by the use the purchaser makes of the thing sold. There is a decision in 1857 that the privilege must be recorded to avail if the thing sold has been incorporated with so as to become part of the immovable. The decision has no support in the French authorities, nor in the later adjudications of this court, and where they deal with registry at all it is because the Constitution in existence required all privileges to be recorded. Gary vs. Burguières, 12 An. 227; Constitution 1868, Art. 123. In this case it is not his privilege for the price on which

the vendor insists. It is his ownership of the movable he demands. If the law will not allow the mortgage creditor to defeat the privilege on the movable which, unpaid for, happens to be placed in the building subject to the mortgage, it is not easy to appreciate why on the same principle the ownership of the movable should not be equally protected against the mortgage creditor.

On what principle can the mortgage be extended beyond the property of the debtor. Civil Code, Art. 3278. Instances are not infrequent of the property of third persons placed by them on the mortgaged property, but it has never been supposed such articles were subject to the mortgage. In this case there is no controversy on the issue of the ownership of the heater. It belongs to the vendor under his conditional sale. It is the case of the property of the third person never subjected to the mortgage, unless it is to be maintained that our Code transforms the property of the vendor who has never parted with his ownership into that of the purchaser. Can it be said the law will enforce against the mortgage creditor the privilege of the vendor for the price of the thing sold on the mortgaged premises, but for the benefit of the mortgage creditor will not permit the vendor to remove that property, though no price has ever been paid, and under the conditional sale the vendor is the owner of the property. We find no warrant in our Code for this view of the law. It seems to rest on the protection it is claimed the law gives to the creditor who takes the mortgage on the faith of the public records showing no encumbrance on the property, or who spreads on the records his mortgage notice to all it is urged, that no lien can be acquired to the prejudice of the mortgage. There are striking analogies, at least, opposed to this view. The law, notwithstanding the recorded mortgage, will enforce against the creditor the claim of the workman for work on the property mortgaged; the owner of the immovable is not permitted to profit by the construction or works of a third person on the immovable; the mortgage creditor must pay for the improvements of the third possessor, and we think it beyond doubt that the mortgage yields to the vendor's privilege on the movable sold and attached to the mortgaged property. Civil Code, Arts. 3268, 507; *Penn vs. Citizens Bank*, 32 An. 195; *Citizens Bank vs. Miller*, 44 An. 199; *Lapene vs. McCann*, 28 An. 749; *Carlin vs. Gordy*, 32 An. 1285; 1 *Troplong Priv. and Hypoth.*, No. 113. It seems to us on the same principle the claim of the vendor,

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who remains the owner of the movable placed in the mortgaged premises must be admitted against the mortgaged creditor, and in reaching this conclusion we have given the fullest consideration to the argument and authorities cited by plaintiff's counsel. .

There might be difficulty in some cases attending the removal of the movable property from the building in which it is placed. The judgment of the lower court restricts the claim of the vendor to that part of the property sold which can be, as we appreciate the testimony, detached without injury to the building.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

NICHOLLS, C. J., absent.

ON APPLICATION FOR A REHEARING.

MILLER, J. The petition for the rehearing directs attention to that part of the judgment of the lower court which condemns the plaintiff to pay costs and allows damages for the injunction dissolved by the judgment. It is urged in the petition that neither costs nor damages should be allowed, because the plaintiff's injunction was maintained in part.

The real controversy was as to the defendant's right to remove any portion of the property. The judgment maintained defendant's position so far as the pipes are involved. An injunction maintained only on an immaterial point will not affect defendant's right to costs or damages. *Morgan vs. Driggs*, 3 An. 124; *Rowly vs. Kemp*, 2 An. 360. If the controversy related only to the piping, in all probability defendants would have promptly surrendered all claim to the pipes, and there would have been no necessity for an injunction. Nor was the intention of the lower court called to the question of costs proper in all cases, if an error in that respect is committed, and that is the sole ground of complaint. The court will not reverse a judgment merely because of an error as to costs not the subject of any controversy nor sought to be corrected in the lower court. Besides, neither costs nor damages were alluded to in the discussion in this court on the trial of the case, and hence are not to be urged on the rehearing. *Bank vs. Lawless*, 3 An. 129; *Fulton vs. Brown & Phelan*, 10 An. 350; *Ames vs. Merchants' Insurance Company*, 2 An. 594; *C. P.* 912; *Stafford vs. Smith*, 6 La. 93; *Stark vs. Burke et al.*, 9 An. 344; *Succession of Samuel Broom*, 14 An. 67.

Rehearing refused.

Bank vs. Constable, etc.

No. 11,866.

WASHINGTON STATE BANK vs. G. R. BAILLIO, CONSTABLE, ETC.

The limitation of ten mills of parish or municipal taxation permits the levy up to that limit by the parish, and the levy up to the same limit by the municipal corporation. Constitution, Art. 209; 86 An. 328; 84 An. 362; 88 An. 230.

A PPEAL from the Eleventh Judicial District Court for the Parish of St. Landry. *Perrault, J.*

Kenneth Baillio for Plaintiff, Appellee.

Estillette & Dupré and *E. B. Dubuisson* for Town of Washington, Defendant, Appellant.

Submitted on briefs June 10, 1895.

Opinion handed down June 21, 1895.

Opinion refusing rehearing June 29, 1895.

The opinion of the court was delivered by

MILLER, J. This controversy is as to the right of the town of Washington to levy a tax of ten mills for municipal purposes. The parish of St. Landry has levied a tax of five mills, and the plaintiff resists the tax on the ground that, under Art. 209 of the Constitution, the tax of the town and parish can not exceed ten mills. The judgment of the lower court sustained plaintiff's injunction against the tax, and defendant appeals.

The question depends on the construction of Art. 209 of the Constitution, that no parish or municipal tax shall exceed ten mills. The alternative, we think, marks the limitation for the town or parish, not the aggregate of the tax of both; that is, each is entitled to levy a tax up to ten mills. *Laycock vs. City of Baton Rouge*, 36 An. 328; *Favrot vs. Baton Rouge*, 38 An. 230; *Barrow vs. Heppler*, 84 An. 362. If the view prevailed that the parish and town tax together was intended to be subject to the ten-mill limitation, then the tax of either might exclude or leave little scope for the tax by the other.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed at plaintiff's costs.

NICHOLLS, C. J., absent.

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Bank vs. Constable, etc.

ON APPLICATION FOR REHEARING.

The proposition advanced in the argument for the rehearing is, substantially, that municipal taxation in the sense of Art. 209 of the Constitution includes parish and town taxation, when the town is included in the parish, so that the ten mills limitation applies to the tax levy of the parish and town. Our attention is called to Act No. 78 of 1880 as supporting the argument.

It is familiar that under all our Constitutions parish taxation for parish purposes, and the tax of the town or municipal corporation in the parish for municipal purposes, were constantly exerted. The result was the taxpayer paid the State, the parish, and also the tax laid by the incorporated town in the parish (*Iberia Parish vs. Chiapella*, 30 An. 1143). Of course, the framers of the Constitution of 1879 were cognizant of the modes of taxation incident to our system of government. The Constitution expressly recognized the three forms of taxation hitherto subsisting; *i. e.*, State, parish and municipal. When the limitation was introduced these forms were again recognized. First, there is the limitation on State taxation; then comes that on parish or municipal taxation (Arts. 202, 209). The intent to deal with each separately is marked by the disjunctive: No parish or municipal tax shall exceed ten mills. The phrase that follows, "for all purposes whatsoever," it seems to us refers to each parish or municipal tax stated in the previous part of the sentence. This construction is supported by the recognition of parish taxation and municipal taxation, one for parish purposes and the other for town purposes, and the design to limit each. If, as stated in the original opinion, the limit was applicable to the aggregate of parish and town taxation, there would be no specific limit on each, and hence no guide for each to observe. The parish might attempt to tax up to the ten mills, and so might the town. In that contingency the aggregate taxation could not be maintained and the courts would have to distribute the tax between the parish and town, a function legislative in its character, not judicial. The Act No. 78 of 1880, to which our attention is directed, in its first section preserves the distinction between parish and municipal taxation. Its language is: "No parish or municipal tax shall exceed ten mills," and in the closing portion of the section, although the conjunction "and" is used in prohibiting every parish and municipality from taxation exceeding ten mills, still the limitation is, in our view, intended to refer

Castillo vs. McConnico et als.

to the maximum each; *i. e.*, the parish or municipality in the parish shall levy. The precise phase of the question was not before the court, but we think the view we take is, in effect, maintained in the case of *Laycock vs. City of Baton Rouge*, 86 An. 328, and in the case of *Favrot vs. the City of Baton Rouge*, 88 An. 230.

The rehearing is refused.

No. 11,784.

RAPHAEL MARIA DEL CASTILLO VS. W. L. MCCONNICO ET ALS.

The ordinance for the relief of delinquent taxpayers in the Constitution of 1879 authorizes the sale in the mode directed by the Legislature of property on which taxes prior to 1879 were due, as well as of property forfeited or belonging to the State at the date of the Constitution.

Under this ordinance it was competent for the Legislature to direct the sale on newspaper notice for taxes of *such* property, *i. e.* that forfeited or belonging to the State, or on which taxes levied prior to 1879 were due. See Ordinance *Ibid.* Act No. 82 of 1884.

The court adheres to the line of decisions that the deed to the tax purchaser under the Act No. 82 of 1884 is conclusive of the sufficiency of the assessment of the property. 40 An. 142; 41 An. 765 and similar decisions.

A PPEAL from the Civil District Court for the Parish of Orleans.
Theard, J.

Kernan & Wall and John Watt for Plaintiff, Appellant.

R. H. Lea for Defendant, Appellee.

Clegg & Thorpe and J. Zach. Spearing for Defendants in Warranty, Appellees.

Argued and submitted June 5, 1895.

Opinion handed down June 17, 1895.

Rehearing refused June 27, 1895.

The opinion of the court was delivered by

MILLER, J. The plaintiff brings this petitory action to recover a square of ground in the sixth district of the city, acquired by him in 1851. The defendant and his warrantors claim under an adjudication

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Goldman vs. Goldman & Masur.

The opinion of the court was delivered by

MILLER, J. The plaintiff sues on one of the notes given for the price of a stock of goods, claiming the vendor's privilege. The defence is that there was no ground for the sequestration issued; that the note sued on was compensated to the extent of two thousand dollars, claimed to be for an alleged violation of plaintiff's contract not to engage in business. Tender for the residue of the amount is alleged, and there is a reconventional demand for damages claimed to have been sustained by the wrongful seizure under the writ of sequestration. The judgment of the lower court was in favor of the plaintiff, and defendants appeal.

The defendants complain that the judgment of the lower court was changed after its rendition, so that, as it is stated in the brief, there are two judgments. It seems that in entering the judgment there was included an item of thirteen dollars instead of four dollars. To correct this the court rendered and signed the judgment for the proper amount, the correction being made within the delay for making the judgment final. This charge the defendant insists the court had no right to make. The authorities brought to our notice affirm that the court can make no substantial change in a judgment except in the mode provided by law. In one of the cases the lower court changed the judgment after its rendition in a substantial respect; in another the judgment against plaintiff was changed to one in his favor. *Miller vs. Chandler*, 29 An. 91; *Factors and Traders' Insurance Company vs. The New Harbor Protection Company et als.*, 39 An. 583. Here the change was in favor of defendant and to correct an error of nine dollars. We think it was within the power to correct the error as one not of substance. Code of Practice, Art. 547.

The case was called for trial before Judge Potts, the additional judge for the Fifth Judicial District provided by the Act No. 146 of 1894. He recused himself, having been of counsel, and assigned a judge *ad hoc* to try the case. The case was thereafter taken up, and defendant then excepted to the trial before the judge *ad hoc* on the ground that the regular judge of the district was in a condition to perform the judicial functions. It seems that Judge Potts heard and overruled the motion, challenging the competency of the judge *ad hoc*, who thereupon tried the case and rendered the judgment. The defendants insists that Judge Potts had no right to select the judge

ad hoc unless both judges were recused, nor to decide, after recusing himself, the motion challenging the capacity of the judge *ad hoc*. We do not think the act requires the joint action of both judges; its object was to enable the additional judge to act for the dispatch of the judicial business, necessarily implying his single action. Nor was any exception taken when Judge Potts recused himself and appointed the judge *ad hoc*. That appointment was rightfully made, and, in our view, continued in force until the determination of the case. It is claimed that defendant had the right to question the competency of the judge *ad hoc* on the alleged ground that Judge Richardson had regained his health. In our view, this was not a question the defendant could raise under this act of 1894, and the circumstances of this case. The judges are to "arrange between themselves the judicial work." To them is left the question of the disposition of the cases. We must presume this case was disposed of in accordance with the arrangement of the judges. Besides, the bill informs us that Judge Potts had seen, talked with Judge Richardson, whose physical inability to try the case is certified to this court by Judge Potts. We think the bill shows the basis for the appointment of the judge *ad hoc* and that the inability of Judge Richardson existed when the case was tried. We do not think, under these circumstances, it is for the defendant to question the competency of the judge *ad hoc*.

This view, too, in our view, renders unimportant the fact that Judge Potts tried the motions challenging the capacity of the judge *ad hoc*, and it seems it was at defendant's instance that Judge Potts presided on that occasion.

The reconventional demand for damages is based upon the alleged absence of cause for the writ of sequestration. The statute authorizes the writ when the debt and privilege exists and the defendant fears the plaintiff will conceal, part with or dispose of the property on which the privilege exists. The maturity of the debt, that it was unpaid, and the fact that defendants were selling the property, though in due course of business, afforded the basis for the writ. Code of Practice, Art. 275, as amended; *Lowden vs. Robertson*, 40 An. 825.

The defendant pleaded in compensation the amount of the penal obligation of the plaintiff not to engage in business. The penal obligation is, of course, conditional in its character, and if susceptible

Baldwin vs. Sheriff et als.

of enforcement at all, the amount is modified in case of the partial execution of the principal obligations. The plaintiff denies any violation of the agreement in aid of which the penalty was stipulated, or if any, insists it was but partial and inconsiderable. The demand in compensation must be fixed, "equally liquidated and demandable," as the Code puts it. We think it clear that the demand on a penal clause, unliquidated and undisputed, can not be pleaded in compensation against a promissory note. This view disposes of the question of tender, one of the defences. C. C., Art. 2209; *Lacoste vs. Bordere et al.*, 7 N. S. 517; *Pi vs. Vidal*, 5 An. 803. Nor do we think, with due regard to the rights of plaintiff, apprised by the pleadings that he was to meet a plea in compensation admitting of a complete legal defence, that we can deal with the plea as one in re-convention. The lower court has reserved defendant's rights under the penal obligation, and this, in our view, is all to which defendant is entitled.

The judgment in this case allowed ten per cent. on the amount recovered, of which defendant complained, but that stipulation was in the contract.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed, with costs.

NICHOLLS, C. J., absent.

No. 11,845.

A. BALDWIN vs. JOHN S. YOUNG, SHERIFF, ET ALS.

The vendor under a sale conditioned that the property shall be his until payment of the price does not lose the right thus reserved, because the purchaser for the service and improvement of a building places such property therein, and against the creditor of the purchaser with a mortgage on the building the unpaid vendor may enforce his right to remove the property sold. *Lapene vs. McCan*, 28 An. 749; *Carlin vs. Gordy*, 32 An. 1283; 31 An. 735; 1 *Tropiong Priv. et Hypotheques* No. 113, p. 793.

A PPEAL from the First Judicial District Court for the Parish of Caddo. *Land, J.*

F. G. Thatcher and Alexander & Blanchard for Plaintiff, Appellant.

Wise & Herndon for Defendants, Appellees.

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Argued and submitted June 11, 1895.

Opinion handed down June 17, 1895.

Opinion refusing rehearing June 29, 1895.

The opinion of the court was delivered by

MILLER, J. The plaintiff seeks to enjoin the removal of a heater and its attachments in a building acquired by him at the sheriff's sale under a mortgage of plaintiff on the property, i. e., building and ground. The plaintiff's position is, the heating apparatus for heating the building, used as a seminary, was placed in it by the owner for its service and improvement, thereby became part of the immovable, was covered by the mortgage, and passed to the plaintiff under the purchase by him at the sheriff's sale. The heater and attachments were sold to the owner of the building, never paid for, and under a contract that, until paid for, the vendor should be the owner of the property sold. The vendor obtained judgment against the owner for the unpaid price, with the right to remove the property sold, unless payment of the price was made by a given time. It is the removal under that judgment plaintiff enjoins. The argument on behalf of the unpaid vendor is, that his conditional sale did not divest him of ownership, nor was his right impaired because the purchaser chose to put the property in a building covered then or thereafter by a mortgage, and it is urged that the price being unpaid the vendor can enforce against the mortgage creditor the right to remove the property as decreed in the suit of the vendor against the owner. The judgment of the lower court sustained the vendor and plaintiff, the mortgage creditor, appeals.

The question here, in a varied form, has been the subject of previous adjudications. It is familiar that our law makes part of the immovable, things that have been added by the owner for the improvement and service of the property. Hence the mortgage of the immovable covers not only the soil, the building, but the appurtenances designated by the Code. So the sale of the immovable carries the immovable in the sense of the Code. Things the owner has placed on the immovable for its service and improvement become immovable by destination, is the textual declaration made plainer by the illustration in the Code, of cattle intended for cultivation, implements of husbandry, seeds, beehives, mills, kettles and

Baldwin vs. Sheriff et als.

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of enforcement at all, the amount is modified in case of execution of the principal obligations. The plaintiff declaration of the agreement in aid of which the penalty or if any, insists it was but partial and inconsiderable in compensation must be fixed, "equally liquidable," as the Code puts it. We think it clear, penal clause, unliquidated and undisputed, compensation against a promissory note. question of tender, one of the defences. vs. *Bordere et al.*, 7 N. S. 517; *Pi vs.* think, with due regard to the rights pleadings that he was to meet a plea complete legal defence, that we convention. The lower court has the penal obligation, and this, is entitled.

The judgment in this case recovered, of which defendant is in the contract.

It is therefore ordered by the lower court be

NICHOLLS, C. J.

... privilege?

... until paid for,

... serves *un droit réel* on the

... and Hypoth. No. 118; *Lapene vs.*

... Wyche, 31 An. 735; *Carlin vs. Gordy*,

... parties, we think, sustain the right of the un-

... force his privilege on the movable sold, although

A ... the purchaser it has become part of the immovable.

The vendor of a movable is apprised by law that without registry of the thing sold, he reserves a privilege on the thing sold. Civil Code, Art. 3227; Constitution, Art. 176. It is difficult to see in the light of the provision in the Constitution that the privilege can be defeated by the use the purchaser makes of the thing sold. There is a decision in 1857 that the privilege must be recorded to avail if the thing sold has been incorporated with so as to become part of the immovable. The decision has no support in the French authorities, nor in the later adjudications of this court, and where they deal with registry at all it is because the Constitution in existence required all privileges to be recorded. *Gary vs. Burguières*, 12 An. 227; Constitution 1868, Art. 123. In this case it is not his privilege for the price on which

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Baldwin vs. Sheriff et als.

inst. It is his ownership of the movable he demands not allow the mortgage creditor to defeat the privilege which, unpaid for, happens to be placed in the build- mortgage, it is not easy to appreciate why on the ownership of the movable should not be equally mortgage creditor.

the mortgage be extended beyond the prop- Code, Art. 3278. Instances are not infre- third persons placed by them on the has never been supposed such articles In this case there is no controversy he heater. It belongs to the ven- the case of the property of the mortgage, unless it is to be the property of the vendor into that of the purchaser.

the mortgage creditor the thing sold on the the benefit of the mortgage creditor or to remove that property, though no price and, under the conditional sale the vendor is the

the property. We find no warrant in our Code for this view to the creditor who takes the mortgage on the faith of the public records showing no encumbrance on the property, or who reads on the records his mortgage notice to all it is urged, that no can be acquired to the prejudice of the mortgage. There are striking analogies, at least, opposed to this view. The law, notwithstanding the recorded mortgage, will enforce against the creditor the claim of the workman for work on the property mortgaged; the owner of the immovable is not permitted to profit by the construction or works of a third person on the immovable; the mortgage creditor must pay for the improvements of the third possessor, and we think it beyond doubt that the mortgage yields to the vendor's privilege on the movable sold and attached to the mortgaged property. Civil Code, Arts. 3268, 507; Penn vs. Citizens Bank, 32 An. 195; Citizens Bank vs. Miller, 44 An. 199; Lapene vs. McCann, 28 An. 749; Carlin vs. Gordy, 32 An. 1285; 1 Troplong Priv. and Hypoth., No. 118. It seems to us on the same principle the claim of the vendor,

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and June 11, 1895.
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removal of a heater
Sheriff's sale
and

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begin the work within the delay to be fixed by the court, then the work to be performed by the plaintiff company, suitable compensation to be paid the Canal & Claiborne Railroad Company for any loss of materials or other damage incident to the reconstruction, and under such other limitations as the court shall prescribe to secure the right and interests of both companies. This indication of our views as to the adjustment of the differences of these companies, of course, determines no issues only to be adjudged on the merits. We simply hold that by the reason of the use of the tracks accorded to both, and in view of the allegations in the petition, the plaintiff is entitled to go to trial in the ordinary mode on the petition.

It is therefore ordered, adjudged and decreed that the judgment of the lower court, maintaining the exceptions, be annulled, avoided and reversed, and the trial of the issue, after answer filed, proceed according to law and that defendant pay costs.

No. 11,853.

A. S. BROWN VS. F. P. STUBBS.

Under an agreement to submit differences to arbitration under a penalty stipulated to be paid by the party who refuses to abide by the arbitration, such party must pay the penalty in order to sue to annul the award. C. C., Arts. 3106, 3130.

A PPEAL from the Fifth Judicial Court for the Parish of Ouachita.
Munholland, J. ad hoc.

Newton & Madison for Plaintiff, Appellant.

Stubbs & Russell for Defendant, Appellee.

Argued and submitted June 13, 1895.

Opinion handed down June 21, 1895.

The opinion of the court was delivered by

MILLER, J. The question in this case is after parties have agreed to refer their differences to arbitration, under an agreed penalty to be paid by the party who does not submit, whether a suit can be

Brown vs. Stubbs.

brought to annul the award without first paying the penalty. In this case the plaintiff, who sues to annul, places his action on the grounds that the arbitrator and umpire neglected and refused to hear and consider testimony; to examine books, considered expert statements in plaintiff's absence; refused to summon and examine his witnesses, and transcended their authority. Plaintiff insists that when the award is resisted on such grounds the penalty is not to be exacted as a prerequisite to suit attacking the award. Defendant, on the other hand, insists it matters not what grounds are urged, the award can not be assailed without first payment of the penalty. From the judgment of the lower court, in defendant's favor, plaintiff appeals.

There is no decision on this point by our courts. The Arts. 8106 and 8180 of our Code providing a penalty was to enforce the policy of making the arbitration end the controversy. The language of the last article is of the clearest. If the controversy can be re-opened on the grounds stated in the petition, in most, if not all cases, the award would initiate, instead of terminating contention. The articles in our Code take no account of the causes for refusing to abide by arbitration. Nor does Art. 2047 of the Napoleon Code. Under that article it has been a subject of discussion whether the penalty is not incurred even by a suit to correct error of calculation. Notes to Art. 2047; Gilbert, Code Annoté. We have given careful attention to the argument on behalf of defendant; that distinguishes between a suit to annul the award, because deemed to be erroneous on the merits, and the suit to avoid it founded on causes of the character alleged in the petition. The argument concedes that in the one case payment of the penalty would be a prerequisite to the suit to annul, but affirms that such suit would not be required in the other case. Our Code makes no such distinction. It appreciates that the disappointed party might well suppose ground when none existed. Payment of the penalty, the Code declares, should be made by the party who appeals from it, and by appeal is meant recourse to the courts. Civil Code, Art. 8180. The court can make no distinction when the law makes none.

The plaintiff refers to the difference in the phraseology of the French and English texts of Art. 8106. We think the word "appeal" means the appropriate judicial contestation of the award, as there is no appeal as in the case of the judgment of an inferior

State ex rel. Snider vs. Judge.

court. The penalty is put on either party who resists the award, seems to be the reasonable conclusion.

The question is, we think, controlled by the terms of Article 3130. From the best consideration we have given it, we conclude the exception was well taken.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

NICHOLLS, C. J., absent.

No. 11,736.

THE STATE EX REL. JOHN SNIDER VS. HON. F. A. MONROE, JUDGE
OF DIVISION "C," CIVIL DISTRICT COURT, PARISH OF ORLEANS.

APPPLICATION for Writs of *Mandamus* and *Certiorari*.

George L. Bright for Relator.

Submitted January 29, 1895.

Opinion handed down April 10, 1895.

PER CURIAM.—We have considered with care the petition presented to us in the case of Snider vs. The Judge of Division "C" of the Civil District Court. The case made by the petition is of three verdicts of juries awarding plaintiff damages, each set aside by the judge of the lower court, and the petition avers that on setting aside the last verdict, the judge announced he would set aside any verdict that might be rendered, and that the relator could have a remedy, if the relator would waive the jury and submit the case to the court. By this, we presume, was meant that the judge would refuse to sign any judgment based on a verdict he deemed excessive.

It is argued, with great earnestness, by the relator, that the course of the lower court is, in effect, to deprive the relator of his constitutional right of trial by jury, and it is urged on us that under our supervisory power over inferior courts a *mandamus* should issue to compel the judge to set aside his last order directing the new trial, and to sign the judgment, so as to give the plaintiff in the suit the benefit

of the verdict and affording the defendant the benefit of an appeal. The plaintiff refers us to the decisions of this court, recognizing the weight due to verdicts of juries; to the legislation of other States, limiting the number of new trials, and reference is made also to Thompson on Trials, referring to the subject.

Under our jurisprudence this court has no control of a general character over inferior courts. If the grounds of complaint urged against the decisions of the lower courts in unappealable cases be such as pronouncing judgments without citation, or refusing to hear witnesses, or other violations of right, rendering the proceedings void, the wrong may be corrected by the writ of *certiorari*. The law is careful to limit the writ to such cases. Code of Practice, Arts. 855, 857. The writ of prohibition issues only when the lower court exceeds its jurisdiction. Code of Practice, 845. Our powers are enlarged by the Constitution in respect to these writs so as to embrace all lower courts, but are still substantially restricted within the limits of the Code. The series of decisions, in cases on application for these writs, all affirm the bounds of our jurisdiction in this respect, dispensing with the necessity of any special reference.

The Code of Practice confers on judges of the lower court the power to sign judgments or grant new trials. Such functions involve the exercise of judgment which no other court can control. It has often been held that the lower courts can not be compelled to act in any matter in reference to which they must exercise judgment. To compel the lower court to set aside an order for a new trial in this case would be manifestly to supersede his power to refuse or grant the new trial, a power the law supposes he will exercise in accordance with his judgment. It is for the Legislature to determine what jurisdiction this court shall exercise and within the scope of the jurisdiction conferred on us. We are of opinion we can not grant the relief the relator seeks.

No. 11,753.

A. J. CAHILL VS. PEOPLE'S SLAUGHTER HOUSE AND REFRIGERATING COMPANY, LIMITED.

The directors of a corporation hold out to their creditors, that under their management they will be paid.

They, the directors, can not, in view of this, have the property (of the corporation, in foreclosing proceeding on their mortgage of a date subsequent) sold

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50	590
51	618
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104	182
47	1488
108	78
47	1488
110	878
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and successfully invoke their personal rights as buyers to defeat these very creditors of theirs.

The directors had it in their power to pay the debts.

They could not fail to pay these debts, and retain, personally, every right to contest the privilege to secure an amount they admit due to their creditors.

The right claimed on their mortgages is inconsistent with their obligation as directors to their creditors, who were not third persons.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Rouse & Grant and Bernard McCloskey for A. J. Cahill and Leon and Charles Godchaux, Plaintiffs and Appellants.

E. Houard McCaleb, Jr., Purchaser, and Attorney for Charles A. Thiel, Appellants.

John Dymond, Jr., Geo. W. Flynn, Dinkelspiel & Hart, E. N. Whittemore and *John B. Fisher* for Intervenor and Appellees.

Argued and submitted on briefs April 11, 1895.

Opinion handed down April 22, 1895.

Rehearing refused June 29, 1895.

The opinion of the court was delivered by

BREAUX, J. The plaintiff applied for and obtained an order of seizure and sale upon a mortgage recorded in the mortgage office May 15, 1893, commanding the sheriff to seize and sell the property described in the deed.

The amount of the sale, fifty-six thousand five hundred and fifty dollars, was not sufficient to pay the amount due on the mortgage upon which the process to foreclose issued, much less the debts claimed as privileged.

The contest is between the holders of bonds secured by the mortgage and creditors who claim a superior right under alleged privileges.

The appellants admit that the amounts claimed by these creditors are due and deny that they are entitled to a privilege. The denial is qualified by excepting the Delavergne Refrigerating Machine Com-

pany, entitled, it is admitted, to the privilege it claims. The company's property was encumbered with a mortgage of thirty-five thousand dollars. The following are the facts with reference to that mortgage:

The stock of the company was fixed at three hundred thousand dollars. The stockholders were slow in paying their subscriptions. The board, in consequence, determined to borrow the amount of thirty-five thousand dollars on mortgage. It was taken by three of the directors. In other words, these directors received thirty-five bonds for the debt of thirty-five thousand dollars, not matured at the time of the transaction, which the company owed them.

Subsequently the board of directors resolved to finish the plant by borrowing money on bonds secured by mortgage on the company's property, and to exchange a portion of the bonds thus secured for the prior mortgage of thirty-five thousand. The total of the bonds thus secured by mortgage was one hundred and twenty-five thousand dollars, that is, one hundred and twenty-five bonds of one thousand dollars each.

Thirty-five of these bonds were exchanged for the prior mortgage, which these directors holding the prior mortgage accepted and consented to a cancellation of their prior mortgage.

It is proved that more than eighty of these one hundred and twenty-five bonds issued are held by the directors, and as to the 80-125 of the proceeds of the sale the contest is between the members of the board of directors who are creditors (that is, owners of nearly all the bonds secured by mortgages as mentioned *supra*) and the creditors of the company claiming as privilege, who are:

Manion & Co	\$4,350 06
Edward Thompson	1,608 51
The Southern Electrical Manufacturing Supply Company	581 00
The Delavergne Refrigerating Company	1,600 00
Frank Schiele	690 28

and the civil sheriff for costs.

These privileges of the first five named creditors were recorded, but not strictly within the time required by law to give them preference over a previously existing duly recorded mortgage securing the claim of a third person.

Manion & Co. and Edward Thompson are for labor and material in the construction of the slaughter house, under Art. 3249, C. C.

The Southern Electrical Manufacturing and Supply Company and

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the Delavergne Refrigerating Machine Company are for the balance price, admtd, of movables.

The last, Frank Schiele, for salary and labor.

Prior to the sale creditors of the defendant claiming privileges obtained orders for the separate appraisement and sale of particular property.

All the parties were finally brought before the court *quasi in concursu*.

The plaintiff in the proceedings prayed to have the mortgage securing the bonds held by him decreed prior in rank to any other claim against the proceeds of the sale.

The creditors who claim a privilege urge that the directors of a company by whom a contract is made for labor and materials furnished to the company are not third persons, and can not take advantage of a delay in inscribing the contract or the evidence of the debt. It was proved during the trial that plaintiff is not the owner of the bonds upon which he brought suit to foreclose the mortgage. That they were owned by one of the directors who chose to foreclose in the name of a third person.

The property was adjudicated to a trustee for six of the directors of the company, together with others, not directors. One of these directors is really the owner of the bonds sued on, for whom the nominal plaintiff brought the suit.

The adjudicatees of the property and the nominal plaintiff, appellants, do not oppose the judgment in favor of the Delavergne Refrigerating Ice Machine Company and the civil sheriff for costs; but they pray that the judgments in favor of Manion & Co., Edward Thompson, Frank Schiele, agent, and the Southern Electrical Manufacturing and Supply Company be reserved as far as it gives a privilege upon the property superior to the mortgage of the bondholders.

The controversy on appeal is between the creditors who claim privileges and the creditors who claim on their bonds secured by mortgage. The creditors contend, that the directors are not third persons.

It is settled that a corporation may borrow money of a director, for the payment of which it is absolutely bound.

But the mortgage given is subject to the closest scrutiny; candor and fair dealings are essential to its validity.

In *Twin Lick Oil Co. vs. Marbury*, 91 U. S. 587, 590, the right of a director, who is a creditor of a corporation, is recognized, and he realized the amount due him upon the security he held against the company of which he was a director.

The contest in that case was between the director and one of the stockholders.

The obligation of the directors toward a creditor, under whose authority contracts were made, materials purchased and labor performed, has a greater element of responsibility.

These creditors, unlike shareholders, can have no hearing in the management, no right to examine the books under any circumstances, and none of the rights of the stockholder.

The case here is an extreme one.

The accounts of appellees, save a few hundred dollars, were all due at the time that the corporation, through the Board of Directors, resolved to issue bonds, in order, we are informed, to hold the shares of the capital stock, not disposed of, in its possession and procure the money necessary to complete the installation.

Virtually, these bonds were designed to perform the office of preferred stock; they were made and issued in lieu of the stock in possession of the company.

They, under the circumstance, can not entirely escape, when creditors are concerned, the *onus* and responsibility attaching to stock.

QUI SENTIT COMMODUM SENTIRE DEBET ET ONUS.

The purpose was, presumably, to add to the value of the shares by issuing and negotiating bonds.

It is proved that nearly all of them were owned by the directors.

The mortgage was foreclosed, and they, with two or three others, not directors, became the owners.

The mortgage and the sale under foreclosure, it is claimed by plaintiff and appellant, are superior to the claims of the appellees. We do not think it is possible by the foreclosure of a mortgage, as here foreclosed, to put an end to the claim of creditors, in the individual interest of the directors. These debts were contracted under their management, and while they were in office.

They are not third parties; they had full knowledge and were under some obligation to see these creditors paid, and not to claim

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priority over their claims. *Cochran vs. Ocean Dry Dock Company*, 30 An. 1365; *Cook on Stock and Bondholders*, Sec. 661.

Mortgages and privileges affect third persons when recorded.

The director who is the trustee of the creditor, who has it in his power to stop expenses and prevent losses to the creditor, is not a third person who can acquire rights superior to him.

After these debts to appellees had been incurred the larger amount was borrowed by the defendant company.

It was expended in a short time, under the management of the board of directors.

Not having paid the appellees from these large funds, are they not, as creditors, precluded by their trust from securing to themselves by their official action any preference or advantage over other creditors?

The director can not, in law, under his management expend large amounts and leave his creditor to the unequal contest of establishing his claim as best he may.

As between the directors' mortgage on property bought as in this case and the privilege claimed by the creditors the preponderance of right is decidedly in favor of the latter.

The creditor has the right to the exercise of disinterested diligence and zeal of the director in behalf of the payment of his claim.

The equity of the creditors' claim is of a persuasive character.

Here the directors and the furnisher of supplies to them and of labor are the contestants. However binding the former's claim is against other interests it does not defeat the privilege claimed.

This being our conclusion we deem it unnecessary to pass upon the other question raised.

The judgment appealed from is affirmed.

No. 11,798.

A. A. MAGINNIS VS. UNION OIL COMPANY.

Where real estate is sent to sale at public auction under a written advertisement the intention of the seller as to the object intended to be sold and of the purchaser as to that intended to be bought is to be ascertained by the advertisement and not by conversations or letters written between the parties in prior negotiations for a private sale which had failed and been abandoned. The advertisement binds both parties.

Where real property is adjudicated at public auction everything which is part thereof as being immovable by destination passes to the purchaser without the necessity of specific enumeration in the advertisement. This effect ceases, however, when there are words of exclusion or reservation in the advertisement.

Where the advertisement of real estate for sale at public auction describes the property as to be sold "with the buildings and improvements thereon, and all rights, ways, privileges and appurtenances thereto belonging, or in any wise appertaining," the purchaser of the property under the advertisement acquires the ownership of all the movables made immovable by destination forming part of the property at the time of the sale, although in a subsequent portion of the advertisement the property is referred to as "equipped with water connections with the Mississippi river, together with boilers, filters and pumps, which will be sold with the property, thereby securing free water." It is the duty of the seller to express himself clearly, and any obscure or ambiguous clause is construed against him. C. C. 2461, 2474.

A mere intention to dismattle a building in which machinery had become a part and immobilized by destination, remaining unexecuted up to the time that third persons acquired the property in its actual existing condition, produced no effect as against such third person.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor J.

Gilmore & Baldwin for Plaintiff, Appellee:

The authority to sell real estate and immovables by destination attached thereto can only be established by written evidence.
Arts. 2275, 2276 and 2461, Civil Code.

Machinery set in bricks and mortar, and constituting a cotton-seed oil mill, at the date of the sale of the real estate to which it is attached, is immovable by destination and part of the realty.
Theurer vs. Nautre, 23 An. 479; *Rochereau vs. Bobb*, 27 An. 658; *Tison vs. Sheriff*, 28 An. 793; *Wiel vs. Lapeyre*, 38 An. 303; *Insurance Company vs. Gerson*, 28 An. 310.

Immovables by destination attached to real estate sold at public auction pass by the adjudication to the purchaser, with the real

47	1489
49	125
47	1489
107	713
47	1489
121	756
47	1489
125	851

Maginnis vs. Oil Co.

estate to which they are attached, unless they are expressly reserved in the advertisement, which can neither be explained nor extended by parol evidence. Art. 2461, Civil Code; *Nott vs. Oakey*, 19 L. 18; *Nott vs. Bank*, *Ib.* 22; *Layton vs. Hennen*, 8 An. 1; *Poree vs. Bonneval*, 6 An. 386; *McCarty vs. Canal Co.*, 8 R. 102; *Pew vs. Livaudais*, 3 L. 460; *Lewis vs. Labauve*, 18 An. 382.

A reservation in a sale of real estate of the immovables attached thereto can not be established by implication. Art. 2474, Civil Code.

Denegre & Denegre and *Harry H. Hall* for Defendant and Appellant:

Where, for the purpose of attempting to prove that the defendant corporation, under such an advertisement, intended, as a matter of fact, to sell the oil machinery, plaintiff, by a subpoena *duces tecum*, calls for the production of its resolutions and its instructions to its officers and offers them in evidence, and those resolutions and instructions show conclusively, as does the parol testimony offered by plaintiff, that the defendant never intended to sell, and never authorized the sale of said oil machinery, plaintiff is bound by this evidence and can not contradict it.

The defendant having purchased a building and real estate formerly used as an oil mill and having absolutely abandoned the operation of said oil mill and used it solely as a warehouse, and having further determined to remove all the oil machinery therefrom, and having actually removed a part of it, and being engaged in removing the remainder of it, when stopped by injunction, such oil machinery, which was originally immovable by destination of the owner, has again, by the intention, as above set out, become movable, and will not pass with the building in the sale thereof.

Civil Code, Arts. 468 and 469, provides that utensils necessary for the working of cotton mills and other manufactories may be made immovable by destination of the owner, and other such movables as he only has attached permanently to the tenement or building are likewise immovable by destination, permanent attachment meaning the fixing of movables in such way that they can not be taken off without being broken or injured, or without breaking or injuring the part of the building to which they are attached.

Maginnis vs. Oil Co.

An owner who has the power to make movables immovable by destination has necessarily the right to again make them movables. Laurent, Vol. 5, No. 474.

Immovability by destination in farm or factory ceases to exist when the agricultural or manufacturing interests involved is no longer the motive—that is, when the operation ceases. If the proprietor of the factory manifests the intention to demolish it, if he discharges his workmen, if there is no longer a manufacturing establishment, immovability ceases. It is always by the will of the owner that immovability ceases. Laurent, Vol. 5, Nos. 476, 478 and 479.

And this applies to machinery placed in a factory, although fastened to the building and originally made immovable, both by intention and manufacturing destination. Laurent, Vol. 5, Nos. 479, 480 and 481; see also 88 An. 808.

Thomas J. Semmes joined with Counsel for Defendant in a Brief for Rehearing.

Argued and submitted May 24, 1895.

Opinion handed down June 3, 1895.

Rehearing refused November 18, 1895.

The plaintiff, alleging that on the 11th of January, 1893, he had purchased at public auction from the defendant company a certain piece or portion of ground known as the Maginnis Oil and Soap Works with all the buildings and improvements thereupon, and all the rights, ways, privileges and appurtenances thereunto belonging, obtained an injunction restraining the defendant from removing or in any manner altering or displacing the machinery which plaintiff claimed was part of the purchase. He alleged that the sale and adjudication of this property to him was made without reservation or exception, by the auctioneer at public auction, and transferred to him as owner in full ownership, from the moment of adjudication, all of the improvements and immovables situated on said real estate, or in any manner thereunto belonging, particularly the machinery in said building placed therein, and become immovable by destination.

Maginnis vs. Oil Co.

The property in question was adjudicated to the plaintiff for fifty-five thousand dollars, at public auction on the 11th of January, 1893, under public advertisement, reading as follows:

“ ATTENTION.

“ MANUFACTURERS,

“ WAREHOUSEMEN,

“ CAPITALISTS.

“ GRANDEST OPPORTUNITY EVER OFFERED TO ACQUIRE MAGNIFICENT
PROPERTY FOR MANUFACTURING, WAREHOUSING AND
GENERAL INDUSTRIAL PURPOSES.

“ The superb structures formerly used and known as the Maginnis Oil and Soap Works, in squares Julia, Tchoupitoulas, Commerce and St. Joseph, Julia, Commerce, New Levee and St. Joseph; comprising an enormous frontage of three hundred and seventy-three feet on Julia street, immediately contiguous to the shipping; equipped with water connections with the Mississippi river, together with boilers, filters and pumps, which will be sold with the property.

“ SALE FOR ACCOUNT OF THE UNION OIL COMPANY.

“ *Wednesday, January 11, 1893.*

“ By Robinson & Underwood, auctioneers; office 3 1-2 Carondelet street. On Wednesday, January 11, 1893, at 12 o'clock m., at the Auctioneer's Exchange, Nos. 72 and 74 St. Charles street, by public auction, will be sold:

“ 1. * * * * *

“ 2. A certain piece or portion of ground, together with the buildings and improvements thereon, and all rights, ways, privileges and appurtenances thereunto belonging, or in any wise appertaining, situate, lying and being in the First District of the said city of New Orleans and State of Louisiana, in the square bounded by Tchoupitoulas, Julia, Commerce and St. Joseph streets, and measuring two hundred and thirteen feet five inches and four lines front on Julia street, one hundred and sixty-one feet and nine inches front on Tchoupitoulas street by two hundred and twenty feet nine inches in width on the side line nearest St. Joseph street.

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"The improvements in the square Julia, St. Joseph, Tchoupitoulas and Commerce streets comprise a large two-story brick building fronting on Julia, Tchoupitoulas and Commerce streets, substantially built, and has been used for many years as a manufactory; large wagon passage way leading from Tchoupitoulas to Commerce street, enabling wagons to load and unload inside the building.

"The improvements in the square Julia, St. Joseph, Commerce and New Levee streets, the property advertised under the No. 1, as above given, the special description of which was therein given, but which is omitted here as not bearing upon this controversy, comprise a large two-story brick building, and has been used jointly with the above (the property SECONDLY described), both of which are peculiarly well adapted for manufacturing purposes, and also suitable for warehousing. The foundations of both are of the most substantial character, and the flooring of the finest Schillinger. Equipped with water connections with the Mississippi river, together with boilers, filters and pumps, which will be sold with the property, thereby securing free water.

Terms—One-third or more cash, balance one, two and three years, with six per cent. per annum interest, payable annually; insurance, attorney's fees, and all other usual security clauses. Ten per cent. exacted at moment of adjudication.

"Acts of sale at expense of the purchasers before W. Denegre, notary public."

The adjudicatee paid into the hands of the auctioneers the ten per cent. upon the purchase required by the advertisement.

Defendant pleaded a general denial.

Judgment was rendered in favor of the plaintiff, recognizing him as the owner of the property in controversy, and making the injunction perpetual. Defendant appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. This case has, both through the testimony and the argument, taken a much broader scope than we think the legal situation called for.

A large portion of the evidence was directed to the attempted ascertainment of what the defendant at the sale of the 11th of January, 1893, intended to sell, and what the plaintiff intended to buy,

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through conversations between the plaintiff and the defendant, at a time prior to the sale, when the former was either at one time, as a broker acting for William Henderson, or on his own behalf at another, seeking to purchase the property from the defendant at private sale. These negotiations failed and were abandoned. The sale of the 11th of January was not a private sale, nor an auction sale made in consummation of any arrangement or understanding between plaintiff and defendant, but an independent, distinct act by which the property was offered for sale to any one who would be the last and highest bidder on the terms and conditions set forth in the advertisement. Plaintiff stands as to his rights and obligations precisely in the same position which any other purchaser who had no prior dealing with the defendant up to the date of sale would have occupied, purchasing under the same advertisement.

The questions before the court are: (1) Whether the auctioneer was authorized by defendant to sell the property; (2) whether the advertisement of the property for sale as made, is to be taken as the act of the company, and (3) what are the rights and obligations of parties resulting from a sale of the property in its then condition under the said advertisement.

We do not understand defendant to deny that the property was sent to sale by proper authority. The minutes of the finance committee of the defendant company of the 27th of October, 1892, of the 30th of November, 1892, of 24th of December, 1892, the letter of T. R. Chaney, its first vice president, of November 2, 1892, to Mr. Winship, and the course pursued by the defendant since the adjudication would establish that fact, if it were controverted. Defendants' position as we understand it is: (1) That although the auctioneers were authorized to sell the property, they were not authorized to sell it in manner such as would convey to the purchaser title to the machinery in the building, and (2) that a sale under the advertisement as made would not have that effect. The finance committee seems to have delegated to Vice President Chaney "the power to instruct that preparations be made for an auction sale," and that gentleman for that purpose placed himself in communication with Second Vice President Winship. In his letter to the latter of November 2, 1892, referring to the sale, he said: "I have, however, brought it to the attention of the finance committee, and recommend that we take necessary steps to offer this property, as proposed by

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Robinson & Underwood, at auction, which recommendation they approved, and it will therefore be in order for you to put this in hand. The usual terms of sale down in your section, I believe, are one-third cash, balance in one, two and three years on mortgage. I expect to be in New Orleans before this property will be offered, and will agree with you on limit price."

The auctioneer, Robinson, says he was called on by Mr. Winship with regard to the sale. "The instructions he gave me were simply handing me the title. His instructions were simply to advertise the property as designated in the title. As I understand, his instructions were simply to advertise the property belonging to the Union Oil Company, two pieces of realty as designated in the title. His instructions were specifically to sell the property as advertised. I had written out the advertisement, stating that the property was equipped with all modern appurtenances of machinery, but Mr. Winship very emphatically and positively eliminated that part of the advertisement, and stated to me that under no circumstances was there any machinery to be sold. It was not my province to make any further inquiry, as I was simply delegated to make the sale." Being asked the question: "You were authorized to sell the machinery mentioned in the advertisement," the boilers, filterers and pumps, "and no other machinery?" he answered, "No other machinery." And being further asked: "And after you had drawn up an advertisement including all the machinery and buildings Mr. Winship objected to it and eliminated it?" he answered: "Yes, I had prepared a very elaborate advertisement, dwelling upon the machinery contained in the building, as I knew it would be a very attractive feature."

This testimony was admitted over plaintiff's objections and under a bill of exceptions reserved. We allude to it now only as going to show that the advertisement, as finally made and acted upon, was an advertisement approved of by Mr. Winship and prepared under his eye and direction. There is no doubt that Mr. Winship believed that a sale under this advertisement as made would exclude the machinery in the building from passing with the property as part of it, and that his intention was that it should so announce to bidders. The question, however, is whether, as a matter of law, his belief was well founded and his intentions could save the situation if he were mistaken. The rights of plaintiff and defendant are to be tested by the actual legal consequences flowing from a sale made

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under the particular advertisement as being the authorized advertisement of the company. These consequences can not be altered or checked because the agent of the company may have had an erroneous belief as to what the advertisement, as written, meant, or what it would legally convey. The advertisement controlled the rights and obligations of the parties. *Layton vs. Hennen*, 8 An. 1; *Poree vs. Bonneval*, 6 An. 388.

The sale being at auction and offered to the last and highest bidder without reservation and limit, the adjudicatee through the adjudication, and the deposit made by him, acquired a vested right to the ownership of whatever legally passed under the advertisement. The price offered by the last and highest bidder has no bearing upon the legal question as to what was offered for sale and what was sold. The determination of that question rests upon matters existing prior to the adjudication.

Looking at the building at the date of the sale, without reference to the advertisement, we are of the opinion that the machinery at that time formed part of the real estate as immovable by destination. It was placed upon the property by its owner for its service and improvement, and had been so used. C. C. Arts. 468, 469. And, though for special reasons, subsequent owners may have discontinued this use, for a certain time, it has never been dismantled. A mere intention of dismantling, remaining unexecuted up to the time that third persons acquired ownership of the property in its actually existing condition, would produce no effect as against such person.

It did not follow, however, that because the machinery at the time of the adjudication was part of the immovables by destination that it necessarily passed to the adjudicatee, for it was within the power of the seller through his advertisement (if properly worded) to operate its legal severance from the land at the very moment of the sale. This whole case turns upon whether such severance was operated either expressly or through equivalent implication. This is really the point upon which the parties are at issue. Plaintiff points us to that portion of the advertisement wherein the object offered for sale is declared to be a certain piece or portion of land *together with the buildings and improvements thereon, and all rights, ways, privileges and appurtenances thereunto belonging, or in any wise appertaining.* He claims that *even without these words the*

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machinery (if it was in reality part of the immovable property) would have passed by the sale unless there were in the advertisement words of reservation or exclusion, but that *with these words added*, the matter is taken beyond debate. Defendant, on the other hand, insists that the advertisement shows plainly and unmistakably on its face that the machinery was not included; that in describing the property it is referred to as "equipped with water connections with the Mississippi river, together with boilers, filters and pumps, which will be sold with the property, thereby securing free water;" that this special enumeration of particular portions of the machinery clearly excludes the idea that any other objects besides those particularly mentioned were to be disposed of with the land, and that this same fact is specially drawn to the attention of bidders through the auctioneers' headlines to the advertisement.

The plaintiff replies that the mention of these special articles was simply the selection by the auctioneer of some of the salient advantages of the property in order to attract special attention, as is customary in all auction sales, nothing more; that the machinery would have passed without any allusion to "improvements" and "appurtenances" as a matter of course, but that particular mention of the "improvements" and "appurtenances" as forming part of the object to be sold withdraws from the consideration of the case all mere inferences and conjectures; that if it had been the intention of the vendor to have excluded the machinery from the sale it was his duty to have done so in clear and exact terms, and everything obscure or ambiguous is to be construed against him. O. C. Arts. 2474, 2481.

Holding as we do that the machinery was, at the date of the sale, immovable by destination, we think in the absence of words of reservation and exclusion in the advertisement, it passed to the purchaser of the real estate, as part thereof, and that the judgment of the District Court to that effect was correct. *Williamson vs. Richardson, Sheriff*, 31 An. 686; *Hollingsworth vs. Chaffe*, 33 An. 554.

The judgment appealed from is hereby affirmed.

 State ex rel. Insurance Co. vs. Board of Assessors et al.

 47 1498
 47 1548
 47 1498
 48 455

No. 11,659.

**THE STATE EX REL. MECHANICS AND TRADERS INSURANCE CO. VS.
THE BOARD OF ASSESSORS ET AL.**

The uncollected premiums of an insurance company are not exempt from taxation as income.

The shares of the capital stock of a manufacturing corporation, when held and owned by an insurance company, are taxable as being part of its assets, notwithstanding the capital, machinery and other property of said manufacturing corporation are exempt from taxation by constitutional provision.

A PPEAL from the Civil District Court for the Parish of Orleans.
Theard, J.

J. Q. Flynn and William B. Lancaster for Plaintiff, Appellant.

E. A. O'Sullivan, City Attorney, and Henry Renshaw, Assistant City Attorney, for Defendants, Appellees.

Argued and submitted February 18, 1895.

On first hearing the judgment of the District Court, which was for the defendants, was set aside. On application for a rehearing, the final opinion was handed down June 17, 1895.

Rehearing refused November 18, 1895.

The opinion of the court was delivered by

WATKINS, J. This is a proceeding of mandamus to compel the cancellation of relator's assessment for the year 1894.

It is as follows, viz.:

Money at interest	\$111,793
Money in possession	18,091
All other articles	42,200
Total	\$172,074

The grounds of relator's complaint are, first, that under the heading of "money at interest" there is included "income," which, under the law, it is alleged, is not taxable; second, that under the item "all other articles," there are included shares of stock in the National Acid Company and the Standard Guano and Chemical Company, said corporations being manufacturers, whose property and shares

of stock are exempt from taxation under Art. 207 of the Constitution.

The answer of respondents is that the assessment is correct and the taxes thereon based are lawful and due.

The testimony shows on the first proposition that the item "money at interest" includes the net value of uncollected premiums due relator from its customers; that is to say, the total amount, less fifteen per cent; and, on the second proposition, it is that the item "all other articles" includes two hundred shares of the capital stock of the Standard Guano and Chemical Company, a manufacturing corporation within the meaning of Art. 207 of the Constitution.

On this statement the court *a qua* pronounced judgment in favor of the respondents and the relators have appealed.

In this court the argument of respondent is that a tax on uncollected premiums of an insurance company is not a tax on income; that they may be a source of revenue, but they are not income, and that the assessment of them as property of the corporation is legal and valid. That the shares of an exempt corporation are taxable in the hands of any third person as the representative of the value of its shares of stock, and that the Legislature had not the power, by any mere omission, to extend an exemption so as to include assets of a corporation which have a pecuniary value which is assessable under the terms of the Constitution.

On the other hand, the contention of relator's counsel is that its uncollected premiums are not "credits" in the sense of the revenue law of 1890 under which the assessment in question was made; that "the shares of manufacturing corporations simply represent the capital of such corporations, and as such are exempt under Art. 207 of the Constitution," and that "there is no authority in the Act of 1890 to assess the *shares* of corporations other than that mentioned in Sec. 27, the capital and not the shares being assessable."

I.

Taking the second proposition first, we have for consideration the questions, (1) whether the shares of the capital stock of a manufacturing corporation, the property of which is exempt from taxation under the provisions of Art. 207 of the Constitution, are assessable in the possession and ownership of another corporation whose property is not exempt from taxation; (2) whether there is any authority

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under the revenue law of 1890 for the assessment of the *shares* of the capital stock of an insurance corporation such as the relator is, as property.

It will be observed at a glance that the assessment made against the relator does not, *prima facie*, deal with either question which is propounded; but they are necessarily predicated upon the relator's allegations and proof at the trial.

The assessment was made of "money at interest," "money in possession," and "all other articles"—no mention being made of either the relator's *capital*, or *shares* of its own stock, or the stock of any other corporation whatsoever.

Reference to the revenue law will show that it declares that there "shall be levied annual taxes amounting in the aggregate to six mills on the dollar of the assessed valuation of all property situated within the State of Louisiana, except such as is expressly exempted from taxation by law," etc.

That it further declares that "the term 'property,' as herein used, means and includes * * * all movable property and chattels; all personal property; all goods, wares, merchandise and other stock in trade, in possession, on hand, and under control; * * * the cash value of all judgments, suits and causes of action; all *rights, credits, bonds and securities of all kinds; promissory notes, open accounts, and other obligations; all cash,*" etc. (Our italics.)

And it further declares that "all coins, United States and foreign, whether current, or uncurrent; all currencies, bank notes and other proper moneys; all moneys loaned at interest; all shares of stock in all *banking* companies, or associations, incorporated or non-incorporated * * * all other articles or things whatever possessing any money value."

Then follows this sweeping provision, as if to make assurance doubly sure, viz.:

"This enumeration shall not be so construed as to exempt from taxation any property or values not enumerated herein," etc.

But that is not all, for it provides further, viz.:

"The above enumeration of assessable property is in no way intended to apply to the assets of banking companies, or associations whose *shares* of stock are assessable in lieu thereof under Sec. 27, save in so far as is declared in said Sec. 27." Sec. 1 of Act 106 of 1890.

From the foregoing it is quite plain that whatever course may have been antecedently pursued by the General Assembly with reference to the assessment of the *shares of stock of insurance companies and corporations*, it was changed by the revenue law of 1890, so as to make all of their properties assessable without reference to their shares of capital stock.

The only exception to that rule is found in Sec. 27 of the act, and it runs as follows viz.:

"That no assessment shall hereafter be made under that name, as capital stock of any National bank, State bank, banking company, banking firms, or banking associations, whose capital stock is represented by shares, *but the shares shall be assessed* at the actual value, as shown by the books of the bank, or banks, to the shareholders, who appear upon the books, regardless of any transfer not registered or entered upon the books * * * and all taxes so assessed shall be paid by the bank, company, firm or association, which shall be entitled to collect said amounts from the shareholders, or their transferees," etc.

"It further provides that all real estate owned by the bank, company, firm, etc., * * * shall be assessed directly to the bank, company, firm * * * and the *pro rata* of such direct property tax, proportioned to each share of the capital stock, shall be deducted from the amount of taxes assessed to the share under this section," etc. *Ibid.*, Sec. 27.

It will be readily perceived that the section provides a mode for the assessment of the *shares* of stock, and the *real estate* of banking institutions, generally, that is at once exceptional and different from all other assessments; and different, in some particulars, from any prior revenue law in reference to books, etc.

For Sec. 28 of Act 98 of 1886, which was under consideration and interpreted by this court, in *Bank of Shreveport vs. Board of Assessors*, 41 An. 181, provided that all property owned by the bank, company, firm, association or corporation, which is taxable under Sec. 1 of this act, shall be assessed directly to the bank, company, firm, association or corporation, and the *pro rata* of such direct property taxes, and of all exempt property, proportionate to each share of capital stock, shall be deducted from the amount of taxes assessed to that share under this section."

Consequently the question of difficulty in that case was for the

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court to determine "the precise meaning of the language (of the statute) which required the deduction of *all exempt property*."

Under the provisions of Sec. 27 of Act 106 of 1890 no such difficulty can arise, even with regard to the assessment of banks, because it distinctly provides "that *all real estate* owned by the bank * * * shall be directly assessed to the bank;" and it further provides that the "*pro rata* of such direct property tax, proportioned to each share of the capital stock, shall be deducted from the amount of taxes assessed to the share," etc.

But with regard to other companies, corporations or associations, whose capital stock is represented by shares, there is no difficulty whatever, because there is no provision of the revenue law of 1890 which directs or requires an assessment of its shares, and consequently no question can arise with regard to any deduction at all. Yet it by no means follows that the *shares are exempt from taxation* by legislative intendment, or in effect.

That question is covered by the provisions of the next succeeding section thus:

"That *all other corporations*, save those enumerated in Sec. 27 of this act, shall be assessed directly upon all property owned by the corporations which is taxable under Sec. 1 of this act," etc. *Ibid* Sec. 28.

This is perfectly conclusive and requires no interpretation. All the *property* of any corporation other than a banking institution must be assessed on all taxable values of any and every kind; that is to say, on everything which gives value to its shares of stock, but not upon the shares of stock.

Does this method of assessment include shares of stock in other corporations which are exempt from taxation by the terms of the Constitution?

In *Bank of Shreveport vs. Board of Assessors*, *supra*, it was "conceded that shares in banks, whether State or national, are liable to taxation by the State, although the *capital* of the bank may be *entirely* invested in United States bonds," and that concession was made in view of the jurisprudence which is established in *Van Allen vs. Assessors*, 3 Wallace, 573; *People vs. Commissioners*, 4 Wallace, 244, and *Bank vs. Commonwealth*, 9 Wallace, 353; *vide* U. S. Revised Stats., Sec. 219. But the plaintiff in that case sought to *reduce the assessment* on its shares by deducting therefrom the

value of non-taxable securities in its vaults upon which its business operations were predicated. This, our decision held, could not be done under the terms of the Constitution. But since that decision was rendered, as has already been shown, the Legislature has so altered the revenue law as to remit from assessment both the *shares* and *capital* of all other corporations and associations than banks, as *such*, and in lieu thereof directs and requires an assessment to be made of *all their property*, of any and every kind, which gives value to their shares or capital.

And in this regard the revenue law of 1890 makes another very important addition, viz.:

"But unless three months prior and continuous ownership can be shown in any holdings of national, State, or municipal bonds, or stock in any other corporation whatsoever, then the market value of such holdings shall be assessed to such corporation as *so much money in possession*."

That was exactly the course pursued by the respondents in this instance.

But the converse of that proposition must be true, that if three months' prior and continuous ownership of bank or other stock is shown, the holder is entitled to have same specially assessed.

Not only is that so, but the statute makes another important distinction, and that is, that the stock of even a banking corporation which is held by an insurance corporation is assessable to the latter as *money in possession*; or in other words, the stock of one company or corporation loses its identity by being carried into another corporation, and becomes subject to taxation as "*money in possession*," notwithstanding same may be non-taxable as a share of the stock of the corporation by which it was issued.

This principle has been frequently affirmed by this court.

In *City vs. Canal Bank*, 29 An. 851, it was held that the bank could not escape taxation by merely investing a portion of its assets, equivalent to its surplus, in non-taxable securities; but that such securities "though themselves non-taxable, shall be counted, as they are used, and were designed to be used as assets of the bank for the purpose of affecting and extinguishing so much of its indebtedness."

In *State ex rel Jacobs vs. Assessors*, 37 An. 850, the court approved the ruling in *City vs. Canal Bank*, and said:

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"Even if private bankers stood upon the same plane as in incorporated banks, and were subject to the same rules of assessment as to their capital, and were to be taxed only upon the surplus of their assets over their debts, they could not escape taxation by simply investing a portion of their assets, equivalent to such surplus, in non-taxable United States bonds; but such bonds, though themselves non-taxable, would, nevertheless be counted as a part of the assets, and as offsetting, to that extent, the liabilities."

That the shares of stock of a corporation are property in the sense of revenue laws is the settled interpretation of this court, as attested by its opinion in *Schreiber vs. Board of Assessors*, 37 An. 908. In that case the point was made that the plaintiff's assessment was illegal because it contained one share of the capital stock of the New Orleans Cotton Exchange, which was non-taxable because there was no provision of the revenue law making it taxable. But the court said that was incorrect and cited the provisions of the revenue law, the terms of which are almost identical with those of the revenue law of 1890, and said:

"But it is manifest that the shares in other companies are equally declared included in the phrases movable or personal property; and even if this were not broad enough, the term property alone is expressly defined as meaning, *inter alias*, all shares of stock, and whatever possesses a money value. * * * If these shares of stock be not taxable it would be difficult to find any securities that are. They fall within the definition of property as including all shares of stock, and of course within the broader designation of whatever has a money value." See particularly *City vs. Mechanics and Traders Insurance Company*, 30 An. 876.

In *Parker, Tax Collector, vs. The Sun Insurance Company*, 42 An. 1172, it was claimed by the defendant that certain property, viz.: certain State and city bonds, should be deducted from its assessment—the contention being precisely the same as relator's is here—as exempt property. Of this claim the court say:

"And the averment is made that the exempt property is worth more than the company's shares of stock, and that a proper deduction thereof from the assessment would reduce it to nothing, and annihilate it completely."

On fully considering the question, the court held:

"The failure of the assessor to deduct from an assessment against

the shares of stockholders of an insurance company the value of certain State and city bonds, which are *owned by the corporation*, and are exempt from State taxation, does not render such assessment void, because they are not exempt property in the sense of the statute and the State Constitution."

That decision quoted and approved *Bank of Shreveport vs. Board of Reviewers*, 41 An. 181.

The case was preceded by *Home Insurance Company vs. Board of Assessors*, 42 An. 1131, in which the effort of the plaintiff was to procure the deduction from its assessment of the Crossman bonds of the city of New Orleans as property which was exempt from taxation. The court say:

"The exemption claimed has been twice denied by this court. United States bonds and State bonds in which the capital of a corporation are invested are not deductible from the assessment of the shares. *Bank of Shreveport vs. Board of Assessors*, 41 An. 185; *The Board of Liquidation vs. Thoman*, 42 An. 605."

It seems difficult to understand how a proposition that has been made so plain by repeated adjudications of this court could be misunderstood.

For the purpose of assessment a distinction has been frequently taken between the *capital* of a corporation and *shares* of stock belonging to its stockholders. This distinction is fully illustrated in the opinion of this court in *Citizens Bank vs. Bouny*, 32 An. 239, in which it was held that "numerous decisions of the highest authority maintain that the exemption of the *capital* of a bank does not impair the right of the State to tax the *shares* in the hands of the stockholders, and without so deciding absolutely we shall assume, for the purposes of this case, that the charter exemption of the *capital* of the bank does not extend to the *shares* in the hands of the stockholders." Citing numerous authorities.

A like principle governs our decision in *City vs. Canal Bank*, 32 An. 157.

And in *Van Allen vs. The Assessors*, 3 Wallace, 583, the Supreme Court said:

"But in addition to this view, the tax on the *shares* is not a tax on the *capital* of the bank. The corporation is the legal owner of all the property of the bank, real and personal, and within the powers conferred upon it by the charter, and for the purposes for which it

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was created, can deal with the corporate property as absolutely as a private individual can deal with his own. * * * The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares, and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct, independent interest or property held by the shareholder like any other property that may belong to him." *People vs. Commissioners*, 4 Wall. 258; *Bank vs. Commonwealth*, 9 Wall. 358; *Citizens Bank vs. Bouny*, 32 An. 289; *Bank of Shreveport vs. Board of Assessors*, 41 An. 181; *Parker, Tax Collector, vs. Sun Ins. Co.*, 42 An. 1179.

But this proposition has been nowhere more clearly or more forcibly stated than it was in *Home Insurance Company vs. Board of Assessors*, 42 An. 1131.

In discussing and applying the principle announced in *Bank of Shreveport vs. Board*, 41 An. 185, the court said: "The bonds in the quoted cases were United States and State bonds. In the case under consideration they are New Orleans city bonds. The latter are not more exempt than the former. *They are all exempt from taxation, and the assessing officer can not directly list and assess them for the purpose, but they can not, because of their exemption, be deducted from the total of the shares of the shareholders.*

"These bonds are more particularly the property of the corporation; and the share of a stockholder can not always be assimilated to the capital stock of the corporation. They are carried to a separate account, subject to different rules, and are not always similar. They are the individual interest of the stockholder; an interest which accompanies the person of the owner, giving him the right to a proportional part of the dividends when declared, and to a proportional part of the effects of the corporation when dissolved.

"The capital stock is more especially the property of the corporation."

The object of the Legislature is manifest.

It was intended to prevent a double exemption. Otherwise a manufacturing corporation enjoying the exemption of its capital from taxation under the provisions of Art. 207 of the Constitution could sell its shares of stock to an insurance company and procure

the means of operating its business; and the insurance company could invest the earnings of its business *exclusively* in such stock, and have it exempted from taxation also.

By this means both businesses would be shielded from taxation, while only one is exempted.

The words in which the constitutional exemption is couched are these, viz.:

"There shall also be exempt from taxation and license * * * the capital, machinery and *other property* employed in the manufacture," etc.

They do not necessarily carry the significance of exempting the shares of stock of any corporation; nor do they refer to any *corporation* as exempt.

The legality of former legislation recognizing a distinction between *capital* and *shares* of stock was maintained, and the language of the Constitution must be so construed. It does not say "there shall be exempt from taxation the capital, machinery or other property of *a corporation* employed in the manufacture of textile fabrics;" and by the creation of a manufacturing corporation for such purpose, a new and additional exemption of its shares of stock can not be created.

It is evident that the money which is invested in the shares of the stock of a manufacturing corporation constitutes the *capital* which is exempt from taxation; but those shares in the vaults of an insurance company, such as the relator, are quite as liable to taxation as non-taxable government bonds and other non-taxable securities are. Even more so; because it is, at least, questionable whether the shares of stock in a manufacturing corporation are non-taxable.

It seems clear that it was the intention of the Legislature—clearly expressed in the revenue law of 1890—to reach and make liable to taxation this fruitful source of revenue; for in the very nature of things a corporation is not the possessor or owner of *its own* shares of stock. The very object of issuing stock is to obtain the money of others, who take and hold same in expectation of earning dividends arising from the successful operation of the enterprise.

Desirous of fostering manufacturing industries within the borders of the State, the Constitutional Convention proposed, and the people ratified, the exemption from taxation, for a specified period, of "the capital, machinery and other property employed in the manufacture

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of textile fabrics, etc.;" but that exemption has ever been strictly construed, and must not be extended to other subjects of taxation which are not clearly contemplated by it.

On this branch of the subject the judgment is undoubtedly correct.

II.

Are the *uncollected premiums* of an insurance company exempt from taxation as "income," or liable to taxation as "credits" in the sense of the revenue law?

The provisions of Art. 207 of the Constitution will be examined in vain for an exemption of "income" from taxation, and the plain meaning of the term "credits" employed in the revenue law includes the uncollected premiums of an insurance company. Its language is general—all rights, credits and open accounts and other obligations.

They are broad enough to cover the uncollected premium of the relator.

We are of opinion that it was decided, if not by direct adjudication, at least by fair implication, that premiums in course of collection are taxable. *Vide* Liverpool and London and Globe Insurance Co. vs. Board of Assessors, 44 An. 760, and *Railey vs. Board of Assessors*, 44 An. 770.

These uncollected premiums are mere debts in the course of collection. They are assets which have not yet materialized into cash, not yet realized. This identical question was decided by the Supreme Court of Illinois in *The Republic Life Insurance Co. vs. Pollok*, 75 Illinois, 300, in which the court expresses itself thus:

"It also fails to appear what amount constitutes the reinsurance reserve. But it is said that the reinsurance reserve and the premiums being collected are not subject to taxation. We fail to perceive why they are not, as they are funds and claims that would be, in the hands of a natural person. A merchant or other business man is taxed on the funds he has on hand, as well as on all debts owing him that are collectible or so regarded, and no reason is perceived why a corporation should not be required to contribute in the same way to the support of the government."

In *City of New Orleans vs. Fourchy*, 30 An. 911, a question was raised as to the constitutionality of an *income tax* which was assessed under the Constitution of 1868, and the court said:

"As there is no proof on the subject, and as the general rule is that *incomes are taxable*, we must hold that the defendant falls within the rule, and not within the exception."

And in *Forman vs. The Board of Assessors*, 85 An. 825, a similar question was presented, and the court held:

"We have no occasion to determine whether, under the Constitution of 1879, the Legislature has the power to levy an *income tax*. That question will be determined when presented in such manner as to render its decision necessary."

In *Parker, Tax Collector vs. North British and American Ins. Co.*, 42 An. 428, the court simply say: "It is not necessary for us to decide whether or not, under the Constitution, the Legislature had the power to levy an *income tax*. It suffices to say, that if the Legislature had such power, it would be an indisputable condition of its exercise that the tax should embrace the *incomes of all alike*," etc.

Outside of the foregoing decisions we are aware of no adjudications upon the question; and, in the absence of express constitutional exemption, positive precept of the Legislature, and judicial interpretation, we feel bound to deny exemption from taxation to the relator's uncollected premiums.

It is therefore our deliberate conviction that our former opinion and decree were erroneous, and must be set aside and annulled.

It is therefore ordered, adjudged and decreed that our former judgment be annulled and set aside; and it is further ordered and decreed that the judgment appealed from be affirmed.

I concur in the decree.

FRANCIS T. NICHOLLS,
Chief Justice.

I concur in the decree.

HENRY C. MILLER.

MCENERY AND BREAUX J. J., DISSENTING.

Under the Revenue Act the company is taxed on all the property it owns, including real estate, personal property, rights, credits and cash. The question is whether bonds or shares shall be taxed, although exempt from taxation under the law, and whether these bonds and shares (exempt from taxation when owned by individuals or partnership) shall be taxed when owned by corporations.

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Bonds and shares (exempt from taxation) are exempt wherever they may be found, when it is attempted to directly tax them.

In several decisions of this court heretofore the question in matter of taxing shares of the corporation by which they had been issued was considered.

In the Shreveport Bank case, 41 An., a leading case upon the subject, treating the shares as taxable under the express provision of the law, the court decided that in establishing their value the United States bond held by the bank was not deductible.

In Home Insurance Company vs. Board of Assessors, 42 An. 1131, 1134, it was held that the principle announced in the Shreveport Bank case applied to the plaintiff insurance company and to the shares of the shareholders. This was under Act 85 of 1888. Under that act shares of insurance companies were taxable. They are not taxable under the more recent statute of 1890.

Under the former statute no assessment was made of the capital stock of any "national bank, State bank, banking company, banking firm, or banking association, or of any corporation, company, firm or association, whose capital stock is represented by shares, but the actual shares shall be assessed to the shareholders, who appear as such on the books, regardless of any transfer, not registered or entered upon the books, and it shall be the duty of the president or other officer to furnish to the assessor a complete list of those who are borne upon the books as shareholders, and all taxes so assessed shall be paid by the bank, company, firm, association or corporation, which shall be entitled to collect the amount from the shareholders or their transferees." Section 27 of Act 85 of 1888.

This section further reads substantially, when property shall be assessed directly to the bank, company, firm, association or corporation, *all exempt property shall be deducted* from the amount of taxes assessed.

If that law were not repealed by the statute of 1890, as the purpose now is to tax the property of the company direct, and not the shares of its shareholders, the exempt property should be deducted.

But we take up the Revenue Act of 1890, the act now in force, and immediately a substantial change is manifest.

Section 27 of that act provides that "no assessment shall hereafter be made under that name, as the capital stock of any national bank, State bank, banking company, banking firm or banking association,

whose capital stock is represented by shares, but the shares shall be assessed at their actual value as shown by the books of the bank, or banks, to the shareholders who appear as such upon the books regardless of any transfer.

The last statute is the law upon the subject in question. It completely repeals, to that extent, the Revenue Act of 1888, as is made evident by the following.

Section 1 of Revenue Act of 1890:

"That Act No. 85 of 1888 be amended by striking out its title by inserting in lieu thereof the above title, by striking out Secs. 1 to 33 inclusive."

This certainly strikes out Sec. 27 of the Revenue Act of 1888, under which the taxes were imposed, that were declared legal in *Home Insurance Company vs. Board of Assessors*, 42 An. 1181, 1184.

That section having beyond question been repealed, decisions under the repealed law can not, in the nature of things, be conclusive in interpreting the existing repealing sections. If sections of the revenue statute had not been repealed by the subsequent Act of 1890 the prior decisions would still apply.

In the face of the section which reads "that all corporations, save those enumerated in Sec. 27 of this act, shall be assessed directly upon all property owned by such corporations," we do not think that the shares issued by these corporations are taxable if the property of the corporations is already taxed as the section requires.

The authority to tax shares other than bank shares was withdrawn by the last revenue act, and that act expressly declares "that all other corporations save those enumerated in Sec. 27 (*i. e.*, the bank corporations) shall be assessed directly upon all property owned by such corporations," thereby substituting property as taxable to shares.

If there was not an express repeal, the parts of the former law left out are repealed. *Sutherland on Statutory Construction*, par. 137.

We, therefore, dissent.

It was held in several decisions under the Revenue Act of 1888, that the shares of a corporation are an independent and distinct element of value, in the matter of taxation, from which the value of the property belonging to the corporation, exempt under the law, is not to be deducted.

We have no dissent to express from those decisions.

State ex rel. McCune, Testamentary Executor vs. Judge.

We dissent from a decision interpreting the Revenue Act of 1890, as having reference to property as understood in matter of taxation, and not from decisions interpreting the Revenue Act of 1888, having reference to shares.

No. 11,883.

STATE OF LOUISIANA EX REL. G. T. McCUNE, TESTAMENTARY EXECUTOR, VS. FRED. D. KING, JUDGE OF DIVISION B, OF THE CIVIL DISTRICT COURT.

The respondent Judge having, in an *ex parte* order, annulled an inventory, because the officiating notary had failed to give notice to a presumptive minor heir to be present at the time and place of taking same, assigns as his reason for so doing that the minor was without a tutor, and he deemed it necessary for the protection of her rights: *Held*, there was no such excess of power or grave irregularity exhibited as would justify relief by *certiorari*.

APPPLICATION for Writ of *Certiorari*.

W. B. Lancaster for Relator.

Submitted on briefs November 4, 1895.

Opinion handed down November 18, 1895.

ON APPLICATION FOR A WRIT OF CERTIORARI.

The opinion of the court was delivered by

WATKINS, J. This is an application for a writ of *certiorari* for the purpose of testing the legality of the respondent's order, annulling and setting aside an inventory taken in the succession of Mrs. Sophia A. Knapp.

Relator avers that he was duly qualified as the testamentary executor of the will of Mrs. Sophia A. Knapp; and, having caused her will to be probated and procured letters testamentary, he caused an inventory to be made of the property of the testatrix, filed it in court, and petitioned for its homologation, and for the sale of movables sufficient to pay privileged debts. That three days afterward the respondent entered upon the petition which accompanied the inventory, the following *ex parte* order, viz.:

"In this case the presumptive heir, here present and in the city

to the knowledge of the executor, his counsel and the court, not having been notified of the taking of the inventory herein as prescribed by law, the inventory taken on the 18th of July, 1895, is annulled and set aside; and it is now ordered that another inventory be taken in accordance with law," etc.

His averment is, that in rendering said order the respondent exceeded his powers and acted with grave irregularity, to the great injury and detriment of the succession. That the only heir of the decedent who is in the State is a minor of about the age of fourteen years, whose mother is living, but to whom no tutor or tutrix has been appointed, and that, on that account, she is incapable of receiving notice of the taking of an inventory, and the law does not require the notary to do a vain thing. That, in any event, the presence of an heir at the taking of an inventory is not vital to the validity of the inventory, it being merely permissible for heirs to attend, and that the law does not denounce the act as null on that account.

Respondent returns, substantially, that his order was legal and that same was done in the interest of a minor heir who had no tutor and is under the protection of the court, especially when by the terms of the will, as in this case, the testamentary executor is constituted universal legatee to the prejudice of the minor's *legitime*.

All the papers in the *mortuaria* are brought up with the return and fairly exhibit the correctness and accuracy of petition and return. They show that the appraised value of the property only aggregates the sum of six hundred and eighty-four dollars, and this fact suggests the necessity of an economical administration.

While the granting of such an *ex-parte* order as the one complained of is somewhat unusual, and it may be of doubtful validity, yet, in our opinion, the rights and interests of all parties will be better conserved by the maintenance of the *status quo* than by the revocation and annulment of same.

The respondent acted in the interest of the minor heir, who was unrepresented, and for whom he stood in the relation of her next best friend; and we should feel very loath to change it if we could. Certain it is that it presents no appearance of the excess of power and grave irregularity of which the relator complains; consequently his application must be rejected.

It is therefore ordered and decreed that the demands of the relator be rejected at his cost.

 State vs. Moss.

No. 11,908.

STATE OF LOUISIANA vs. J. M. Moss.

In a capital case where the jury separate, and some are out of sight and out of hearing of the remainder, unattended by an officer, a verdict of guilty will be set aside and new trial granted.

A PPEAL from the Second Judicial District Court for the Parish of Bossier. *Watkins, J.*

M. J. Cunningham, Attorney General, and *A. J. Murff*, District Attorney, for Plaintiff, Appellee.

J. A. Snider, J. A. W. Lowry and *Joannes Smith* for Defendant and Appellee.

Argued and submitted November 9, 1895.

Opinion handed down November 18, 1895.

The opinion of the court was delivered by

MCENERY, J. The defendant was indicted and tried for murder and convicted for manslaughter. He was sentenced to imprisonment at hard labor for five years.

His defence is that there was during the trial, a separation of the jury.

The deputy sheriff who had charge of the jury, in his testimony, on a motion for a new trial, says:

"When we would take them to the rear in the daytime, some of them would be contrary and fool around. We would carry them to the privy that belonged to the court house, which was a privy in general use by anybody that wished to use it. The privy is about fifty yards from the court house and has several apartments in it, and is of wooden structure. The different sections are separated by a plank partition, and the front is surrounded by a high plank wall. When one, two or three wished to go, they would go on the outside, and the balance would stop on the outside of the wall in the shade of a wood pile, and those on the inside would be out of my view, and the view of those on the outside. * * * * *

"There was a separation of the jury on Saturday morning between 3 and 4 o'clock. At this time I was called by some of the jurors, stating that some of them had to retire, and upon their insisting on retiring, I took two of them out, locking the door upon those that remained in the court room. I took them down stairs, and they went into the yard, and I sat in the hall door of the court house watching them while they were there. Myself and those two jurors were entirely out of sight and hearing of the remaining ten while they were in the room.

"At night the jury occupied the large court room. The entrance to the grand jury room is at the head of the grand stairway coming into the large court room. The main entrance at the head of the stairway to the main room could only be fastened from the outside, so that no one could pass through it, but it could be opened from the inside so that those inside could go out.

"The grand jury room on Friday night was occupied by some ladies and children. The deputy sheriff in charge of the jury says that he does not know whether the husbands of these ladies occupied that room or not, but he saw the husbands here that day. Some jurors occupied the petit jury room that adjoins the grand jury room. One entrance of this petit jury room opened near the back door of the court room."

The testimony shows that there was at least one well defined separation of the jury, when the two jurors on Saturday morning were taken down to the yard, and the remaining jurors were left, unattended, in a distant part of the court building.

There were opportunities for members of the jury remaining upstairs to communicate with persons in the court building. The jurors were accessible, and misconduct is presumed.

The separation of the jury, as disclosed by the testimony, is fatal to the prosecution. *State vs. Warren*, 48 An. 828; *State vs. Foster*, 45 An. 1176.

It is therefore ordered, adjudged and decreed that the verdict and sentence be set aside, avoided and reversed, and it is now ordered that the case be remanded to be proceeded with according to law.

State ex rel. Liggins vs. Judges.

No. 11,870.

**STATE OF LOUISIANA EX REL. J. S. LIGGINS VS. THE JUDGES OF THE
FIRST CIRCUIT COURT OF APPEALS.**

The Supreme Court is without power, in the exercise of its supervisory jurisdiction, to coerce the Circuit Court of Appeals to reinstate a case it has dismissed for want of appellate jurisdiction, and to try and decide same on its merits.

APPPLICATION for a Writ of *Mandamus*.

Kidd & Van Hook for Relator.

Submitted on briefs June 25, 1895.

Opinion handed down November 18, 1895.

PETITION FOR A WRIT OF MANDAMUS.

The opinion of the court was delivered by

WATKINS, J. Relator, as defendant in the suit of Hamilton & Brooks vs. J. S. Liggins, on appeal to the court of the respondents, complains that they dismissed his appeal on the ground that their court was without jurisdiction *ratione materię*; and his prayer is that our writ of *mandamus* compel respondents to reinstate his appeal, take jurisdiction thereof, and decide it upon its merits and according to law.

In his petition the statement of his claim to relief is that in the plaintiff's petition in the aforesaid suit it is alleged that in 1892 one Arthur Kelly traded with them to the amount of ninety-seven dollars and seventeen cents and more, and that in the fall of that year he (Kelly) paid on the debt two bales of cotton. That relator (Liggins) caused them to lose the debt and damaged them thereby in the sum of one hundred and four dollars, and for that amount they brought suit against the relator, as well as for twenty-five dollars attorney's fees, and prayed for judgment accordingly.

Relator further shows that on the trial of that cause the plaintiffs tendered evidence in support of their demands, to which he, by counsel, objected, on the ground that the District Court was without

47	1516
48	674
49	1087
47	1516
117	298

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jurisdiction *ratione materiæ*; and said objection having been overruled and the testimony admitted, he retained a bill of exceptions—relator insisting that the matter in dispute, and therefore the test of jurisdiction, was the difference between the sum of ninety-nine dollars and seventeen cents and the value of the two bales of cotton, an amount less than fifty dollars, the lower limit of the jurisdiction of the District Court.

That the evidence admitted over his objection showed that the original amount of Arthur Kelly's account with Hamilton & Brooks was one hundred and sixty-eight dollars and seven cents, upon which sixty-eight dollars and ninety-five cents, as the price of the two bales of cotton, was credited, leaving a balance due of ninety-seven dollars and seventeen cents, and for which, with interest added, suit was brought.

That the District Court entertained this theory, and rendered judgment against him for seventy-seven dollars; and from that judgment relator appealed to the respondent's court, entertaining the belief, as above stated, that the District Court was without jurisdiction, and that the evidence referred to was improperly admitted.

Relator further represents that respondent's court, in substance, held that the amount in dispute was the difference between the amount ninety-nine dollars and seventeen cents and the value of the two bales of cotton received—sixty-eight dollars and ninety-five cents—which was thirty dollars and twenty-two cents; and that this sum was the true test of the jurisdiction of the District Court, and, necessarily, deprived them of jurisdiction; and they consequently dismissed the appeal, without disposing of the merits of the case in any way.

The return of the respondents has thereto annexed a copy of their opinion in the aforesaid cause, fully stating their reasons for having dismissed relator's appeal as aforesaid, and therein is fully set out their grounds for denying relator relief by *mandamus*.

From the former we make the following extracts, viz.:

"The petition alleges that Arthur A. Kelly, a resident of the parish of Lincoln, purchased from the plaintiffs, during the year 1892, plantation supplies to the amount of ninety-nine dollars and seventeen cents, and that said Kelly paid on the account two bales of cotton. It is clear from these allegations that as between the plaintiffs and their debtor Kelly the amount claimed in the petition is the differ-

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ence between ninety-nine dollars and seventeen cents, the amount of the account, and the value of the two bales of cotton paid by Kelly on the account.

"The evidence, to which we were compelled to refer to ascertain the amount of the payment, discloses the fact that the two bales of cotton represented a credit on the account, of sixty dollars and ninety cents. This sum taken from the amount of the account, ninety-nine dollars and seventeen cents, leaves a balance of thirty-eight dollars and twenty-seven cents, as the matter in dispute between the plaintiffs and their debtor, Kelly.

"The evidence, which we have examined alone upon the question of our own jurisdiction, discloses the further fact that the one hundred and four dollars and twelve cents, which the plaintiffs sued for as damages against the defendant, represent the account ninety-nine dollars and seventeen cents against Kelly, with interest added up to the time when the suit was brought

* * * * *

"The difference between the amount of the account, which constitutes the basis of the suit, and the credit acknowledged in the petition, is the matter in dispute, and, under the law, is the test of jurisdiction.

"The courts have repeatedly recognized this test, and the question is no longer an open one."

For these reasons respondent dismissed the relator's appeal.

A careful scrutiny of the foregoing shows that the respondents, in determining their own jurisdiction, examined *only* the allegations of the plaintiff's petition, and that portion of the parol proof which appertained to the value of the two bales of cotton which was attributable to the credit of the defendant, and that in so doing, they accepted relator's theory, as appellant, and dismissed the appeal for want of appellate jurisdiction, declining to entertain and decide the issue raised as to the original jurisdiction of the District Court *vel non*.

In their return, the respondents reviewed and analyzed their opinion, and make it even more explicit by the following statement, viz.:

"The evidence showed that the difference between the ninety-nine dollars and seventeen cents alleged as the original amount of the account in the body of the petition, and the one hundred and

four dollars and twelve cents for which the judgment was prayed, was for interest, four dollars and ninety-five cents, computed up to the time the suit was brought, and which was added to the principal of the account, ninety-nine dollars and seventeen cents, in order to make the amount for which judgment was prayed, one hundred and four dollars and twelve cents. So, the amount in dispute, exclusive of interest, four dollars and ninety-five cents, clearly seems to be the alleged principal of the account due by Liggins to Hamilton & Brooks, to-wit: ninety-nine dollars and seventeen cents, less the proceeds of the two bales of cotton which the petition in that case admits was paid on the account, and which, the evidence shows, amounted to sixty-eight dollars and ninety cents, leaving a balance of principal of the account, of thirty-eight dollars and twenty-seven cents, to which, if the demand for attorney's fees, twenty-five dollars, should be added, the aggregate is fifty-five dollars and twenty-two cents, which is below the appellate jurisdiction of the Circuit Court."

Aside from the foregoing statements of the petition of the relator, the return of respondents and the certified copy of the opinion of the Circuit Judges, we have nothing before us from which to obtain any information bearing upon the question at issue; and accepting same, as we must do, as our guide, the necessary result is that we must decline to interfere, as interference would be an invasion of the domain of *res judicata*.

The respondents were competent, and by the law charged with the duty of ascertaining the jurisdiction of their court, *ratione materis*, in the premises; and by their judgment as well as by their return they show that they heard the cause on argument, and after its submission examined the record and all the evidence they deemed *pertinent* to enable them to decide that question, and, *ex proprio motu*, dismissed the appeal for want of appellate jurisdiction in the Circuit Court.

This application invites the court to exercise its supervisory jurisdiction over the court of the respondents and command them to reinstate the suit of Hamilton & Brooks vs. J. S. Liggins on their docket, and try and decide same upon its merits, and this evidently we can not do.

The only reason that relator assigns is that in the case of *State ex rel. J. S. Liggins vs. Judge Third Judicial District, No. 11,810*,

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decided by this court in May last, 1895, *ante.*, page 1022—we declined to hold the judgment null, and decide that the respondent's court was without original jurisdiction, because the principal of the sum demanded was less than fifty dollars, insisting that our judgment is exactly opposite in theory from that of the respondents, and should control. But relator's error is in confounding the original jurisdiction of the District Court with the appellate jurisdiction of the Circuit Court—two altogether different things.

It is quite true that, in the course of our opinion, we took a different view from that of respondents, and said: "From the record and the respondent's return it substantially appears that the plaintiff's allegation to the effect that Kelly had dealt with them to the amount of ninety-nine dollars and seventeen cents and more was, by the relator as defendant, as well as his counsel, taken to be the *full amount* of Kelly's original account, which the credit of the proceeds of the two bales of cotton reduced to a sum less than fifty dollars, the lower limit of the original jurisdiction of the District Court. Constitution, Art. 109.

"But such is not the case, as, in point of fact, the total amount of Kelly's account with Hamilton & Brooks was one hundred and sixty-eight dollars and twelve cents, and when the sum of sixty dollars and ninety cents, the proceeds of the two bales of cotton, were applied thereto as a credit, the net balance of ninety-nine dollars and seventeen cents was produced."

Immediately afterward occurs this further statement of the opinion, explanatory of the foregoing, viz.:

"It was proper for the District Judge to hear and consider evidence on the question, and to base his judgment thereon, as evidently he did. For, on the face of the petition, Hamilton & Brooks demanded of the relator, as defendant, a judgment for a sum in excess of one hundred dollars; and relator's reliance was evidently upon proof to exhibit an *inflation* of plaintiff's demands, for the purpose of maintaining the original jurisdiction of the District Court *ratione materiæ*."

But our opinion was grounded on evidence which was brought up in the transcript of the proceedings in the District Court, and which is as follows, viz.:

"In order to avoid copying evidence adduced in Hamilton & Brooks vs. J. S. Liggins, No. 900, on the docket of the Third District

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Court, Lincoln parish, and to save costs, the attorneys for the plaintiff, and the defendant judge, in the above suit agree that the evidence in the said suit No. 900 showed the following facts on the question of jurisdiction, viz.:

"When plaintiffs Hamilton & Brooks began on the trial of suit No. 900 to offer evidence of the debt due, the said firm, by Arthur A. Kelly, counsel for defendant Liggins, interposed the following objection to the same: (1) That the court is without jurisdiction to try this case; (2) that any evidence to show an indebtedness other than that alleged in plaintiff's petition [is incompetent]; and there is no allegation to support proof of any indebtedness other than ninety-nine dollars and seventeen cents, less a credit of two bales of cotton.

"These objections [having been] overruled, and the defendant, Liggins, [having excepted] to the ruling, the evidence showed that A. A. Kelly bought goods of Hamilton & Brooks during the year 1892; and that he sold said firm two bales of cotton in the fall of 1892, and the proceeds of same, amounting to sixty dollars and ninety cents, were credited on account of Kelly, leaving a balance of ninety-nine dollars and seventeen cents. That five per cent. interest on this balance from the time Kelly left until suit No. 900 was filed, made the amount one hundred and four dollars and twelve cents, for which Hamilton & Brooks prayed for judgment in suit No. 900.

"It is agreed that this be filed as part of the transcript of the proceedings. Signed this 24th of April, 1895.

"KIDD & VANHOOK,

"Attorneys for J. S. Liggins.

"ALLEN BARKSDALE,

"Judge Third District of Louisiana."

We have that record before us now and have reproduced the entire agreement for the purpose of demonstrating how completely it supports the statement of our opinion; and upon that evidence we can safely affirm the correctness of our judgment maintaining the original jurisdiction of the respondent District Judge.

We could not have done otherwise.

In that case, a petition for *certiorari*, we were not called upon to decide whether the judge was correct in admitting, on the trial in his court, that evidence—a question to be determined by the Circuit Court *exercising* appellate jurisdiction—but introduced into the record

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in this court for our consideration, as it was, it became our duty to consider it.

But neither that decision nor the evidence upon which it was founded has any pertinence to the question before us at this time.

Evidently that testimony was not before the respondents. It was not adverted to in their opinion. The transcript, as it existed in the case referred to, is reproduced here without addition or explanation. Hence it is still our guide, and it fails to show that said evidence was before the respondents when they dismissed the relator's appeal.

And, in our opinion, we took notice of that fact, and say: "Possibly (relator) lost his appeal in the Circuit Court, on account of the evidence not having been reduced to writing and incorporated in the record, for the examination of the judges of the Court of Appeals."

But whether it was so incorporated in *that* record or not, is of no present concern of ours.

The respondents had the record before them; and, after having examined it with care, they reached the deliberate and conscientious conclusion, that their court possessed no appellate jurisdiction in the premises, and dismissed the suit, *ex proprio motu*.

They declined to examine and decide the case on its merits, and therefore did not review any of the rulings of the District Judge, and his judgment was altogether unaffected by it.

But they did hear and determine the case, and rendered a final judgment in it. They have *acted* judicially in the matter. The effect of their decree is to leave the judgment of the District Court in force; and that of our decree in the *certiorari* proceedings was to confirm it as a judgment that was jurisdictional.

Even if the evidence we have quoted be conceded to have been before the respondents at the time of their decision, it is wholly out of our power to decide and decree in a *mandamus* proceeding that their judgment was wrong, and annul it; much less has this court the power, in such a proceeding, to compel them to reinstate the case of *Hamilton & Brooks vs. J. S. Liggins*, and decide differently from their former decree.

In our view *mandamus* can not be resorted to for such purpose. We have so decided frequently.

In *State ex rel. Beaucoudray vs. Judges*, 41 An. 1013, this Court said: "The Judges of the Court of Appeals, having exercised a legal discretion, can not be compelled by *mandamus* to try the case

differently from what they have." State ex rel. Board of Administrators vs. Judge, 39 An. 665; State ex rel. Berthoud vs. Judge, 34 An. 782; State ex rel. Hearsey vs. Judge, 36 An. 981; State ex rel. Cupples vs. Judge, 34 An. 1016; State ex rel. Insurance Co. vs. Judges, 36 An. 316; State ex rel. Dupierrre vs. Judges, 35 An. 736; State ex rel. Halphen vs. Judges, 38 An. 97; State ex rel. Goodwin vs. Judges, 38 An. 270.

In the respondents' return we note the following, viz.:

"There is no suggestion in the record or minutes of evidence that the general exception was leveled at all the evidence in the case for want of jurisdiction *ratione personarum*, on the ground that he (Liggins) was not domiciled in the parish where the suit was brought, as stated in the opinion of the Supreme Court in the *certiorari* proceedings in State ex rel. Liggins vs. Judge Third District," etc.

Our learned brothers are under an erroneous impression. Our opinion does not state that either "the record or minutes of evidence in the case (shows) that the general exception was leveled at the want of jurisdiction (of the court) *ratione personarum*," but it does state "that the respondent returns that the relator appeared and filed an answer unaccompanied by any plea to the jurisdiction of the court; but when the plaintiffs offered evidence on the trial he interposed an objection to that effect, on the ground that he was not domiciled in the parish where the suit was brought."

Referring to the return of the respondent judge, as it appears in the record, we find the following, viz.:

"Answer was filed and trial was begun without any plea to the jurisdiction having been filed; but when plaintiffs began to offer evidence, defendant Liggins' counsel objected to any evidence being admitted, on the ground that the court was without jurisdiction to try the case, as Liggins, the defendant, was domiciled in the parish of Lincoln, and judgment was prayed for, for an amount exceeding fifty dollars, exclusive of interest; on the face of the papers, this objection was overruled."

The return is not different from the defendant's exception, for it is "that the court is without jurisdiction to try this suit," simply; and that expression is equally applicable to jurisdiction *ratione personarum*, as *ratione materiarum*.

But the reference made in our opinion to the record and evidence "shows that we predicated our judgment upon it as an exception *ratione materiarum*."

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However, this has no greater importance than the preservation of the faithfulness and integrity of our opinion in the former case.

After having examined this case with deliberation and care, we have reached the conclusion that relator is not entitled to relief by *mandamus*.

It is therefore ordered and decreed that the demands of relator be rejected at his cost.

No. 11,874.

STATE OF LOUISIANA VS. JOHN JONES ET AL.

It is not permissible for a trial judge to require the testimony intended to establish the basis for the introduction of dying declarations in evidence to be reduced to writing, in case there is no disagreement between him and defendant's counsel as to what that testimony is.

To render dying declarations admissible in evidence it is only necessary to show, preliminarily, that they were made under a sense of impending dissolution, which soon thereafter occurred.

A declaration of a party accused, made previous to the homicidal assault, does not come under the operation of the rule that requires a basis to be laid for its introduction. It is alone applicable to proof offered by an accused of communicated threats made by the deceased. Such previous declarations of the party accused are admissible for the purpose of showing *animus*, or malicious intent.

The fact of a confession having been made under excitement, and while in a state of great nervousness, does not deprive it of the character of a voluntary statement. Nor is it deprived of that character solely for the reason that it was made to the jailor while he was in close confinement.

It is not competent for an accused to show, upon cross-examination of the jailor as a State witness, that he had, at different times, several days subsequent to the making of the confession, made contrary statements. They are self-serving declarations, and do not fall within the category of *res gesta*.

Notwithstanding all witnesses *pro* and *con* are placed under rule and removed from the court room during the introduction of the testimony, it may be permissible for the judge to allow a person who was present and heard the testimony of others, to testify in case he is satisfied that the evidence of such person was made known, on the spur of the moment, to the party offering him, provided no fraud is intended, and no injury is suffered by the adverse party.

A PPEAL from the Tenth Judicial District Court for the Parish of Avoyelles. *Coco, J.*

M. J. Cunningham, Attorney General, and *Phanor Breazeale*, District Attorney, for Plaintiff, Appellee.

47	1524
112	874
113	955
113	963

47	1524
116	842
117	869

47	1524
122	214
122	526

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Joffrion & Joffrion and A. J. Lafargue for Defendants, Appellants.

Submitted on briefs November 9, 1895.

Opinion handed down November 18, 1895.

The opinion of the court was delivered by

WATKINS, J. From an unqualified verdict, on an indictment for murder, and sentence of death, the two defendants—John Jones and Henry Simmons—prosecute this appeal, relying on several bills of exceptions which they reserved during the progress of the trial.

I.

As it is officially stated by the trial judge in his assignment of reasons for his rulings, that bills of exception one to six, inclusive, being reserved by counsel representing the defendant John Jones, and not by counsel representing Henry Simmons, the testimony adduced and about which controversy arose—the dying declarations of James K. Bond, deceased—had no application to the last named person; and that the subjects matter of same were germane, and therefore considered them together, we will follow the precedent and do likewise.

In bill number one the statement is made that objection was urged to the admissibility of the testimony of a State's witness introduced for the purpose of laying the basis for the introduction of the dying declarations of James K. Bond, who is designated in the indictment as the party who was murdered by the defendants; and the judge was requested to allow the defendant to have same reduced to writing, and reserved objection to his refusal to do so.

The remaining five of the same series are of the same tenor.

The judge says:

“It will be noticed that these bills, two, four and six, contain the facts quoted by counsel themselves, and that portion of the evidence relating to the basis is embraced within quotation marks (“ — ”) made by counsel.

“This is as true and authentic evidence as the court can require, upon the question of proper foundation. The court is therefore in possession of the facts *quoad* these bills, and the simple question re-

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mains as to whether the court acted properly in admitting the dying declaration."

He further says in relation to bills one, three and five:

"If I understand correctly the doctrine established in 41 An. 143, it is only when there exists a disagreement between counsel and the court as to what the evidence is, that the court should have it transcribed by the clerk. When there exists no such disagreement as in the present case, it is a vain and useless consumption of time, which the court should not require.

"Doubtless counsel took the evidence down as it fell from the lips of the witnesses, as the evidence which he transcribes in his bills of exception is identical with that appearing upon the notes which I kept of the testimony."

And as if to more fully show that he acted upon the evidence of those witnesses, he says further, that it, "in connection with the physical facts and circumstances which surrounded the case, satisfied me that the dying declaration of the deceased was made while he was in the full possession of his mental faculties, and under consciousness that he had but a very short time to live."

We have examined with care the case cited by the court, and the decision upon which counsel for the defendant, Jones, evidently relies, State vs. Seiley, 41 An. 143, and find that it substantially bears out the conclusion of the trial judge, for it says:

"We have, on the part of defendant, a demand that the testimony of witnesses on this collateral issue be reduced to writing as detailed to them, for the express purpose of bringing it up for review on appeal, in order to have a question of law determined.

"We have, on the part of the trial judge, a distinct and emphatic refusal of the defendant's request, because his counsel had enjoyed the opportunity of having them incorporated in a bill of exceptions.

"The judge did not rest his conclusions on the adequacy of that statement, but at once proceeded to make a different version of the facts, and rested his conclusions upon it. In so doing he clearly demonstrated the fact that, if the defendant's counsel did have ample opportunity to incorporate the facts in a bill of exceptions, it was, at the same time, rendered invaluable to him by his own, possessing as it does the weight of his authoritative sanction.

"Under this state of facts the accused appears in this court, prac-

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tically deprived of the evidence on which *he solely* depends, and is necessitated to rely upon that to which the judge has certified.”

But how widely different is the situation of this case. The defendant's counsel embodies in his bill of exceptions the testimony of which he makes complaint; and the judge accepts his statement, and says it corresponds exactly with the notes of evidence he made during the progress of the trial. *State vs. McCarthy*, 44 An. 328; *State vs. Nash and Barnett*, 46 An. 194.

It is quite impossible to see in what manner the defendant has been injured by the judge's declination to permit the evidence to be reduced to writing and incorporated in the transcripts. He has had, and will have, the full benefit of it in this court.

But, as we understand counsel's argument, he complains that at the time the objection was urged and the ruling was made no evidence had been introduced, and that, under the decision, in the *Seiley* case, he had a legal right to have the evidence reduced to writing, and that we must take up the bills of exception *seriatim* and decide them in their order; and that proceeding in that order, we must hold the judge's ruling erroneous.

But we must take the case as we find it, and we find all the bills of exception occurring in rotation, with but one answer of the judge to all of them.

Presumably all of them were filed at the same time, and examined by the judge and decided at the same time. Indeed, they all bear the same date of filing, June 3, 1895, and that date is contemporaneous with the judge's ruling.

Conceding counsel's right to have had the bills signed and the judge's reasons assigned, at the dates of his rulings, yet we can not doubt the judge's authority to act as he did under the circumstances related; and, considering them, we feel it to be our duty to decide accordingly.

As the defendant has had the full benefit of the testimony he relied upon, we are not justified in vacating his ruling.

II.

The substance of the testimony which appertains to the admissibility of the dying declarations, as shown by the defendant's bills of exceptions two, four and six, is that an offer was made to send for a doctor, and the deceased replied that “There is no use; I'll

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be dead before he gets here;" and that he soon after died—that is to say, within an hour.

The question is, therefore, whether statements made by the deceased concerning defendant Jones' complicity in his homicide, at the time, is competent evidence against him.

In *State vs. Keenan*, 38 An. 660, this court said: "Dying declarations are those made under a consciousness of impending death, which, however, the defendant need not express in direct terms. His bodily condition and appearance, his conduct and language, as well as statements made to him by his attendants, may be considered, and his consciousness thence inferred. *State vs. Scott*, 12 An. 274.

"We do not conceive it to have been necessary that the deceased should have said that he believed he would die *immediately*, but regard it sufficient, if the facts detailed were such as to indicate that the deceased was conscious, at the time of making his declaration, of his *approaching* dissolution.

"To render such declarations receivable in evidence, the deceased need not have been, at the time, *in articulo mortis*. It was only necessary that same should have been made under a sense of *impending* dissolution which soon thereafter occurred.

"To this sense of approaching death the law attaches the solemnity of an oath, and impresses upon a statement under it the character of evidence." *Vide State vs. Judge Spencer*, 30 An. 365; *State vs. Daniel*, 31 An. 95; *State vs. Trivos*, 32 An. 1086; *State vs. Molisse*, 36 An. 920; *State vs. Newhouse*, 39 An. 862; *Wharton's Crim. Ev.*, Sec. 282.

We are of opinion that the evidence quoted fulfils the conditions requisite to the admissibility of the declarations of the deceased, in evidence, as dying declarations.

But defendant's counsel further insists that there is nothing in the record to show that the statements of the deceased were contemporaneously made. It is evident to our minds that the statement itself furnishes complete evidence of that fact, for it was made during the hour that intervened between the homicidal assault and his death.

III.

The district attorney having introduced a witness and proposed to prove by him certain alleged admissions of the defendant, Jones, his counsel moved the court to have the testimony reduced to writing,

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on the ground that it was necessary that a basis should be first laid for its introduction; and this request having been refused by the judge, he retained bill of exceptions number seven. And when, thereafter, the district attorney proceeded to interrogate said witness with regard to the defendant Jones' admission, his counsel urged the further objection that the testimony was inadmissible, until a sufficient and proper basis had been first laid, and this objection having been overruled by the judge, he retained the bill of exceptions number eight.

As in the previous instance, the judge coupled these two bills together in making the assignment of his reasons; and, thereto, he appended the substance of the witness' statement.

It is to the effect that Jones said to the witness previous to the homicide, on an occasion when the deceased was passing by, that deceased did not like him, and that he did not like deceased, "and this parish is too small for us both."

The judge then states:

"The evidence was taken down by the court, and not by the clerk, as requested by counsel. There was no question of foundation for the admission of such evidence. It was a fact like any other that stood independent and alone, forming only a link in the chain of evidence. As a declaration made before the homicide, it could be admitted to show motive only, and as such it was admissible.

"Now, if the case had resulted differently, and Bond had killed Jones instead of Jones having killed Bond, and such evidence had been offered as communicated threats, it would have been necessary to show a hostile demonstration as a condition precedent to the admissibility of such threats, but as antecedent declarations show *animus*, they need no foundation to rest on."

Our learned brother of the lower court has so completely and succinctly defined the legal principle involved in the two bills of exception that there is absolutely nothing further to add, and we approve of his ruling unqualifiedly. There is nothing in the Seiley case which is applicable to the issue raised. There is no question of *law* raised and to be decided by this court. The two bills present simply a question of the admissibility of evidence appertaining to the *motive* of the accused; *i. e.*, his premeditation or malice aforethought. It was clearly within the province of the jury to decide that question and not for the court.

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IV.

As bill of exceptions number thirteen, which was reserved by the counsel for defendant, Simmons, relates to the same subject matter, it may as well be disposed of in this connection.

He objected to the statement of a State's witness, for reasons similar to those urged by counsel for Jones, and for like reason the court overruled it.

The statement of the witness was as follows, viz.:

"Henry Simmons told me on the day previous to the killing that he had a difficulty with the deceased. He said that the deceased had collared him, Simmons. He said that no man could collar him and live. (That) the parish was not big enough for both."

The judge assigned as his reason for denying defendant's application, that "the above were antecedent declarations, and were admitted to show motive only. No foundation was necessary to their introduction, and therefore there was nothing to open a note of evidence for. I refer to my reasons to bills 7 and 8, as applicable here."

For the reasons we have already assigned, we think the trial judge decided correctly, and his ruling is approved.

Bill of exceptions number nine was reserved by the counsel of defendant, Simmons, to the admission of the testimony of a State's witness, with regard to an alleged confession which was made by Simmons while he was in jail, "it not appearing that the confession was free and voluntary, and admissible in evidence;" and counsel for defendant moved the court to have the testimony as to the admissibility of the confession reduced to writing.

The judge states that there was no conflict between counsel and himself as to the facts testified to by the witness, referring to the testimony that is appended to bill of exceptions number ten.

Bill of exceptions number ten was reserved by counsel for defendant, Simmons, to the ruling of the judge in admitting the testimony of the aforesaid witness, on the ground that said alleged confession "was made under circumstances of great excitement and nervousness (when) accused was not in a proper (frame) of mind to make a free and voluntary confession."

It appears that the witness was the jailor, and, as such, had the accused in his custody.

His statement is as follows, viz.:

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"A day or two after they were in jail Simmons made a confession to him, without offering any inducement or making any threat to him. He was in a cell with other prisoners, and was not chained or bound in any way. The accused looked greatly excited and very nervous, but that was due to no offer of violence or threats from any source whatever, as I was at the time the only one in jail, and unarmed.

* * * * *

"He told me that 'he had fired the first shot, but had missed Bond and John Jones had killed him.'"

The judge says of this statement that it satisfied his mind "that the confession was voluntary and free, and not superinduced by undue influence," and he admitted it with respect to Simmons only.

It is manifest that the confession of Simmons was voluntary, and uninfluenced by any threat or duress of any kind; and it was clearly admissible.

VI.

Bill of exceptions number eleven relates the circumstances of the judge's declination to permit the defendant, Simmons, to prove different statements he had made with regard to the homicide, at variance with the statements of the jailer—his objection being that it was but the supplement of the alleged confession, and explanatory thereof.

The judge says he did not decline to hear the statement, but that the witness was permitted to make answer to the question propounded, and that his answer was as follows, viz.: "Yes; he (Simmons) did, some eight or ten days after this confession, make other statements to me;" and that thereupon the district attorney objected to these statements being admitted "because they were self-serving declarations."

He states that, in his opinion, this objection was well grounded; but he says that "if these declarations had been made at the time that the confession was made, then they should have been admitted as part of said confession; but having been made long subsequent thereto they were clearly objectionable, and they were, therefore, excluded."

It is quite evident that these statements constituted no part of the confession, and are inadmissible as part of the *res gestæ*.

The judge's reasons are conclusive.

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VII.

Bill of exceptions number twelve appertains to the testimony of a witness for the State who was introduced and testified in rebuttal, and contradicted the statement of the accused on an important and material point.

The contention of the defendant is that all the witnesses—those for the State as well as those for the accused—had been by order of the court marshaled and put under rule, and removed from the court house during the introduction of the evidence, and that witness whose testimony was objected to was present and heard all the testimony, and should not have been permitted to testify. The judge states that it appeared from the evidence, as well as the proceedings, that this person had not been summoned or named as a witness at the time of the marshaling of the witnesses, and he was not, consequently, placed under rule. That the district attorney had made the discovery, on the spur of the moment, that he could contradict the statement of the accused by this person, and that he thought it legal and proper, under this state of facts, for him to give his testimony.

Counsel for the accused have cited no authority in support of that contention; indeed they admit that “the facts are different from any previously passed upon.” They further say in their brief that “we do not dispute the discretionary right of the court to exclude or not witnesses from the court room; but when the order has been given, it is fatal error to permit a witness who has heard all the witnesses to testify.”

That may be perfectly true; but it does not cover this case—the witness having been discovered after the testimony had been administered.

In *State vs. Hagan*, 45 An. 839, it was held to be “a question for the lower court, whether the conduct of a witness in remaining in court in violation of an order directing the separation of the witnesses, is ground for a new trial;” and it seems logical that it should be equally within the discretion of the lower court whether he could legally testify. The question is one which appertains, principally, to the *regimen* of the court, and to disobedience of its orders. If, as in this case, no fraud has been attempted, no injury has been suffered, and no disrespect intended, by the witness or the party introducing him, there is no apparent disqualification of the witness.

Hogsett, Sr. vs. Justice.

The trial judge exercised his sound judicial discretion in the premises, and we are not prepared, from anything that appears in the record, to say that he exercised it unwarrantably or arbitrarily.

This completes the examination of all the bills of exception, and we feel constrained to say that not one of them has been well taken, and we must affirm the correctness of the verdict and judgment defendants have appealed from.

Judgment affirmed.

No. 11,889.

STATE OF LOUISIANA EX REL. R. F. HOGSETT, SR., VS. J. H. PATIN,
JUSTICE OF THE PEACE FIRST JUSTICE COURT OF THE SIXTH
WARD FOR THE PARISH OF IBERIA.

In the exercise of the supervisory jurisdiction of the Supreme Court, when the proceedings in the lower court have been regular, the judgment will not be disturbed or reviewed because of the want of or the insufficiency of the evidence to sustain it.

APPPLICATION for Writs of *Certiorari* and Prohibition.

Foster & Broussard for Relator.

W. J. McCall for Respondent.

Submitted on briefs November 4, 1895.

Opinion handed down November 18, 1895.

ON APPLICATION FOR WRITS OF CERTIORARI AND PROHIBITION.

The opinion of the court was delivered by

MCENERY, J. This proceeding invokes the supervisory jurisdiction of this court to annul a judgment in the court of the respondent magistrate for three dollars.

The complaint is that there was no evidence introduced by plaintiff to sustain his demand.

The record discloses that the case was regularly called for trial, the plaintiff and defendant both represented by counsel; the case

47	1538
48	298
47	1538
107	767

Hudson et al. vs. Sheriff et al.

tried, argued by counsel and submitted. The record appears to be regular, and there is nothing in the record that calls for the exercise of the supervisory jurisdiction of this court. *State ex rel. Kramer vs. The Judges of the Parish Court of St. Tammany*, 32 An. 219; *State ex rel. Gooch vs. Robinson*, 38 An. 969; *State ex rel. Chandler vs. Judge*, 48 An. 825; *State of Louisiana ex rel. James A. Manning vs. Sherrard, Judge*, 47 An. 1085.

The relief prayed for is denied and the rule granted discharged and the provisional writs issued vacated, the relator to pay costs.

No. 11,846.

MRS. E. M. HUDSON AND HUSBAND VS. I. GARRETT, SHERIFF,
ET ALS.

When an extension of time has been granted to file the transcript, and the return day fixed, no days of grace are allowed.

For informalities or irregularities in bringing up the appeal, the motion to dismiss must be filed within three days after the transcript has been filed; but for a failure to file the transcript, which presumes an abandonment of the appeal, the motion can be filed at any time after the filing of the transcript.

APPEAL from the Fifth Judicial District Court for the Parish of Ouachita. *Richardson, J.*

Boatner, Potts & Hudson for Plaintiff, Appellant.

Henry Denis, C. F. Madison and *E. T. Lamkin* of Counsel for Citizens Bank of Louisiana, Defendant, Appellee.

Argued and submitted November 9, 1895.

Opinion handed down November 18, 1895.

ON THE MOTION TO DISMISS.

The opinion of the court was delivered by

MCENERY, J. The motion to dismiss the appeal is based upon the ground that the transcript was not filed within the legal delay.

On the application of the appellant the return day for filing the transcript was extended until the 20th day of May, 1895. It was

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47 1534
104 246
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109 1081
47 1534
115 131
47 1534
116 43
47 1534
118 646
118 759
47 1534
1122 434

State vs Means.

filed on the 22d day of May, 1895, two days after the date fixed by the court for the filing of the transcript.

The law does not give any days of grace to the extended return day. *Bienvenu vs. Factors and Traders' Insurance Company*, 28 An. 901; *Cane vs. Caldwell & Kahn*, 28 An. 790; *Heller vs. Lochte & Cordes*, 28 An. 45; *Sun Mutual Insurance Company vs. Tom Bynum et al.*, 32 An. 28; *Succession of Quin*, 37 An. 391; *Von Hoven vs. Von Hoven and Husband*, 43 An. 1170; *Archer vs. Gonsoulin*, 46 An. 141.

The motion to dismiss was filed on the 7th June, 1895—more than three days after the transcript was filed. The appellant contends that the motion was filed too late. The motion to dismiss is not based on any informalities or irregularities in bringing up the appeal, which would require the motion to be filed within three days; but it is based on the fact that the transcript was not filed in time, the presumption being that the appellant, failing to file it in time, had abandoned his appeal. In such a case the motion can be filed at any time. *Dwight vs. McMillan*, 4 An. 350; *McDonogh vs. DeGruys*, 10 An. 76.

The appeal is dismissed.

No. 11,909.

STATE OF LOUISIANA VS. HUMPHREY MEANS.

Secondary Evidence.—The forged and altered instrument of writing was lost; the fact of loss was established to the satisfaction of the trial judge. The evidence noted in the bill of exception shows that the ruling was correct.

Duplicity.—The charge of duplicity in the indictment must be timely urged and the ground correctly stated.

Bill of Exceptions Signed.—A bill signed will receive the consideration of the court, although the trial judge adds as part of his note in the bill that it was not presented in due time and contradictorily with plaintiff's counsel in compliance with the court's rule.

Insufficiency of the Indictment.—The forgery charged, and altering, were not alleged with the required certainty. The extent and character of the altering were not shown; whether the figures (it is alleged) were forged were of a material character, or merely marginal; whether the writing expressed was forged or only the figures.

A PPEAL from the Second Judicial District Court for the Parish of Bossier. *Watkins, J.*

M. J. Cunningham, Attorney General, and *A. J. Murff*, District Attorney, for Plaintiff, Appellee.

State vs. Means.

J. A. W. Lowry for Defendant, Appellant.

Submitted on briefs November 9, 1895.

Opinion handed down November 18, 1895.

The opinion of the court was delivered by

BREAUX, J. The defendant was indicted for forgery. In each count the indictment sets forth that he did "forge and utter" a certain order on S. N. Arnold to pay to Humphrey Means the sum of two dollars and seventy-five cents (\$2.75), signed by W. C. Vance, so as to change the amount of money to be paid in the order to the amount of twenty-nine dollars and seventy-five cents, by inserting the figure nine after the figure two and between it and the figure seventy-five, so as to make it read twenty-nine dollars and seventy-five cents instead of two dollars and seventy-five cents, with interest.

The indictment, on motion of the District Attorney, was amended by substituting the "name of Mrs. T. S. Arnold for that of S. N. Arnold, and adding *per R. C. Stinson* after the words W. C. Vance, making the forged and altered paper set out in the indictment to read: "A certain paper and order on Mrs. T. S. Arnold to pay Humphrey Means the sum of two dollars and seventy-five cents (\$2.75), signed by W. C. Vance, *per R. C. Stinson*, so as to make and change the amount of money to be paid in the order to the amount of twenty-nine dollars and seventy-five cents (\$29.75), inserting the figure nine after the figure two and between it and the figure seventy-five, so as to make it read twenty-nine dollars and seventy-five cents (\$29.75), with interest, to defraud Mrs. T. S. Arnold and W. C. Vance & Co."

As we understand the forgery charged was committed by inserting the figure 9.

The defendant was tried and convicted of forgery, from which he appeals.

He, during the trial, excepted to the ruling of the court and interposed a motion in arrest of judgment.

By the first bill of exception it is shown that the prosecuting officer offered to prove by parol the contents of the instrument for the forgery of which the defendant was being tried.

State vs. Means.

The defendant, by counsel, objected to parol proof of the order, on the ground that proper foundation to prove loss of the instrument had not been laid.

The court overruled the objection and gave for reason that the instrument was lost.

The facts upon which the court based the ruling are set forth as part of the bill of exception and sustain the correctness of the ruling.

The second bill of exception sets forth two grounds of exception.

1. "A defendant can not be charged in one and the same count of a bill of indictment for forgery with altering an instrument and with causing the same to be altered."

2. "That when both figures and written words are used to express the amount to be paid on an order, the written words expressing the amount to be paid govern and make the order, and the figures are not material, and in such case forgery is not committed by altering the figures only of such an instrument as shown to the jury."

Which said special charges were refused by the court on the following grounds, to-wit:

"The recollection of the court is that the special charges asked were substantially charged. There was no charge in writing and the notes of the bill have been laid aside and misplaced, as the rules of the court require all bills of exception to be submitted to the opposing counsel and the court within two days, which was not done. After the lapse of time and the great number of cases tried since this one, the court is not clear as to whether the statement made above by the counsel for defendant is true or not."

The motion in arrest of judgment reiterates the grounds upon which the bills of exception were taken.

The first ground of the bill is not sustained by the facts; the accused was not charged with causing the order to be altered. If he had, it would not have been duplicity in pleading. Bishop, Vol. 1, par. 435; Crim. Pro., Archbold, Vol. 2, p. 810.

Moreover, the plea of duplicity (if there was duplicity, in regard to which we express no opinion, as there is no necessity) was not timely urged.

Mr. Wharton says: "The better view is that it can not be made the subject of a motion in arrest of judgment." Crim. Law, 7 Ed., par. 395.

 Calder & Co., and Calder vs. Creditors.

To constitute a charge of alteration and forgery of an instrument it must be averred that it was altered in a material part. It does not appear with certainty whether the alteration was of a material part.

Of course, if the accused feloniously forged and altered the figures 2.75 so as to make them read 29.75 by adding 9 to a material part of the order, he is guilty of forgery; in other words, if there was no writing of the amount, and if the order read, pay 2.75, and was thus altered, it is forgery. But if the 2.75 was merely marginal, or in character marginal, as relates to a writing of the amount, it was not forgery. Bishop Cr. Pr., par 407.

The learned and careful Attorney General and the District Attorney, in the brief, are of the impression that the indictment and the amendment set forth sufficiently that both figures and the writing were altered.

We do not so read the indictment and the amendment. While there was no necessity, as the order in question was lost, to set it forth in the indictment in *hæc verba* (the substance suffices), it is obvious that it should have been averred that the writing was altered, if such was the fact.

As there is no question of prescription, and the accused will have to answer for any offence he may have committed, we have determined to quash the indictment and set aside the verdict and annul the judgment.

It is therefore ordered, adjudged and decreed that the judgment and sentence appealed from be annulled, the verdict of the jury set aside and the indictment quashed, and that the defendant be remanded in custody, subject to the orders of the District Court of the parish of Bossier.

 No. 11,806.

JOHN CALDER & CO. AND D. R. CALDER VS. THEIR CREDITORS.

The opposition to a syndic's account requires proof of their debts from the creditors whose debts are opposed.

That proof is not afforded merely by the insolvents' books nor by testimony as to entries in them, not binding as against the creditors of the insolvent.

Where it is apparent the proof exists material to the issue, but not furnished from misapprehension or other cause not implying any design to withhold the proof, or gross neglect on the part of the litigant, in such cases, in furtherance of justice, the court, reluctant to dispose of the controversy on an imperfect record, will remand the cause. 8 Martin, 170; 6 N. S. 608; 16 La. 477; 1 H. D. p. 94, No. 1.

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Calder & Co., and Calder vs. Creditors.

APPEAL from the Civil District for the Parish of Orleans.
King, J.

Horace E. Upton, Henry L. Lazarus, E. N. Pugh, Samuel L. Gilmore
for Syndics and others, Appellants.

W. S. Benedict for J. & M. Schwabacher, Opponents and Appellees.

Frank L. Richardson and Philip H. Mentz for Patout & Patout, Victor Bolis, Walter S. Tonan and others, Creditors, Appellants.

Argued and submitted November 8, 1895.

Opinion handed down November 18, 1895.

The opinion of the court was delivered by

MILLER, J. From the judgment of the lower court maintaining the opposition of various creditors to the amounts awarded to others on the account of the syndics, this appeal is prosecuted by the syndics and the creditors whose claims were disallowed.

It is a familiar rule that an opposition to the account of a syndic or administrator puts the burden on the party whose debt is opposed to sustain it by proof, and neither the admission or books of the insolvent alone will make proof against creditors. *Lemos vs. Duralde*, 8 Martin N. S. 258; *Lafon's Heirs vs. His Executors*, 8 Martin N. S. 707; *Boissier's Syndics vs. Belair et al.*, 1 Martin N. S. 481. The testimony in this case to meet the opposition was that of the syndic and his clerk, and neither had any knowledge of the claims they were called on to prove except that derived from the books. Again, the witness, with no personal knowledge, but who speaks only from the entries in commercial books, has no knowledge that qualifies him to prove the debt. See *White vs. Wilkinson*, 12 An. 360.

These appellees are, as we infer, mainly planters whose alleged debts grew out of the shipment of their crops to the insolvents, their factors. The debts claimed are on their books, and on the account of the syndic. The account is supported by his oath required by the rule of the District Courts. We can not accept the books or testimony as to their contents unaided by any other evidence, as proof against an opposition exacting legal proof. Nor can we give

State vs Martin.

greater effect to the syndic's oath. But the record is forcibly suggestive that the appellants are creditors, who, placing undue reliance on the syndic's affidavit and his statements and that of his clerk as a witness, have not administered the proof they could have produced. We are reluctant to dispose of the controversy finally, in this condition of the record and affirm a judgment which gives to the opponents a larger share of the fund than it is morally certain would accrue to them if the record contained the proof, the existence of which it indicates. We think justice requires the case should be remanded.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be avoided and reversed, and the cause is remanded to be proceeded with in accordance with the opinion herein, and that appellees pay costs.

No. 11,869.

THE STATE OF LOUISIANA VS. LOUIS MARTIN, ALIAS BULL MARTIN.

1. The rejection, on cross-examination, of a State witness, of questions propounded to him to bring out (as part of a conversation to which witness had referred in his direct examination), certain statements which it was assumed had been made by the accused to the witness, is not a ground of complaint when these statements have gone to the jury through the testimony of this same witness, when on the stand in rebuttal, and also through the testimony of another witness.
2. When instructions given by the judge to the jury correctly and fully state the law, it would be worse than useless to give additional special charges to them on points accurately covered. A multiplicity of charges only tends to confuse them.

A PPEAL from the Criminal District Court for the Parish of Orleans.
Ferguson, J.

W. J. Cunningham, Attorney General, and *Charles A. Butler*, District Attorney, for Appellee.

H. C. Prevost and *James C. Walker* for Defendant, Appellant.

Submitted on briefs November 9, 1895.

Opinion handed down November 18, 1895.

Defendant was indicted and tried on the charge of having killed and murdered one Ella Speed, and having been convicted of manslaughter and sentenced to the penitentiary, he has appealed.

The questions submitted to the court are set out in the bills of exception.

The first bill states that "on the trial of the case Captain John Journee, of the police force, a witness for the State, having testified in answer to questions propounded by the District Attorney that on the following morning (the morning after the killing) the accused and Toney Martini called at his house, and Martini said: 'Here is Martin to surrender;' that after he dressed himself he immediately proceeded with him to the Third Precinct Station and locked him up;" the District Attorney then said to the witness: "He was not arrested, but surrendered to you on the following morning between 6 and 7 o'clock, at your house?" and the witness having answered "Yes," the witness was then turned over to the defendant's counsel, who propounded to him the following question: "You have told us part of that conversation, now tell us all of it;" but the question was not permitted to be answered, on the objection made by the District Attorney that what was said by the accused to the witness twenty-four hours after the alleged crime, being self-serving declarations, was inadmissible and irrelevant.

That prior to ruling upon the objection the judge required the jury to retire, and the jury having retired, the judge asked counsel of defendant the purpose of his propounding the question, and in answer thereto, counsel out of the presence of the jury stated, that part of the conversation sought to be elicited was to the effect that when Martini made the statement to Journee. "Here is Louis Martin, he has come to surrender," Louis Martin thereupon informed Journee as to the particulars of the accident, resulting in the death of Ella Speed; that Louis Martin stated to Journee that during the morning of the 8d of September deceased in some way got possession of his loaded pistol without his knowledge, and that he, Martin, in his effort to get back the pistol from her, and to keep her from any harm to herself, tried to take it away from her, and in the scuffle and struggle between the two for the possession of the pistol, it was accidentally discharged, and caused the death of Ella Speed. That all this took place as part of the same conversation between Martini, Journee and Martin at the time of the surrender referred to by

State vs. Martin.

Journee in his testimony; that said conversation took place on the 4th September, the day following the death of Ella Speed."

The District Court assigned as the reason for its ruling that "the witness was asked to state what was said to him by the accused twenty-four hours after the commission of the alleged crime. It was not part of the alleged crime. It was not a confession. It was a declaration made by a defendant in his own favor which was sought to be introduced. It was a self-serving declaration. The accused could, and in fact did, subsequently swear to the facts attempted to be elicited from the witness Journee."

"That Journee testified in rebuttal and was asked to repeat the statement made to him by the accused at the time of his surrender to him, Journee—Journee acting at that time as Chief of Police. That no objection was made to the question and the witness gave to the jury the statement of the defendant relative to the killing; that Journee testified that this was the same conversation or statement that the attorney of defendant asked about when he was stopped by an objection by the State; that a witness for the defendant (Martini) testified relative to the same statement, as the whole would appear by their testimony annexed as part of the bill of exception; that the accused succeeded in getting the said evidence before the jury repeatedly and defendant was not prejudiced by the ruling."

The second bill states that the court refused to make, at the request of defendant's counsel, the following special charge:

"If the jury are satisfied, after considering all of the evidence, that there is a probability of defendant's innocence, the court charges that such probability of innocence is a just foundation for a reasonable doubt of his guilt and therefore for his acquittal."

The District Court refused this charge because it had charged the jury fully as to a reasonable doubt, and besides its general charges had, by request, made a special charge to the jury on the same subject. That it had instructed the jury "that the jury may be said to entertain a reasonable doubt when, after the entire comparison and consideration of all the evidence, they can say that they feel an abiding conviction to a moral certainty of the truth of the charge. That proof beyond reasonable doubt is such proof as precludes every reasonable hypothesis, except that which it tends to support. It is proof to a moral certainty as distinguished from an absolute certainty. That the two phrases, proof beyond a reasona-

State vs. Martin.

ble doubt and proof to a moral certainty are synonymous and equivalent. Each signifies such proof as satisfies the judgment of the jury as reasonable men and applying their reason to the evidence before them that the crime charged has been committed by the defendant, and so satisfies them as to leave no other reasonable conclusion possible."

And further, that "the charge requested to be given, which was refused, was absolutely inconsistent and irreconcilable with the special charges given, and practically required the court to determine what evidence was sufficient to constitute a reasonable doubt—that the charge requested would, if given, have invaded the province of the jury."

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant took no exception either to the general or to the special charges given to the jury, and we assume he was satisfied with them as containing correct enunciations of the law. His only complaint is that the court did not make the special charge which he requested should be made. When the charge actually made correctly and fully states the law, it would be worse than useless to have additional special charges on points already accurately covered. A multiplicity of charges only tends to confuse the jury. We think the charges given by the court more fully protected the accused than did the special charges requested.

We see no good ground of complaint as to the matters referred to in the first bill of exception. Giving the defendant the full benefit of accepting as correct his proposition that Journee should have been permitted to have detailed statements which defendant's counsel assumed might have been made to him by Martin at the time that Martini said to him: "Here is Martin to surrender," it is shown that the statements which he sought to elicit were afterward repeatedly given to the jury by Journee and by Martini. We do not see in what manner accused was prejudiced by the statements having been brought out on rebuttal of Journee instead of on his cross-examination. The substantial result to be obtained was to have the statements go to the jury, and this was done. Defendant had the benefit of the statements.

We notice that in Martin's own testimony brought up with the

State ex rel. Insurance Co. vs. Board of Assessors et als.

records he denies having made the statements which were sought to be proved.

It is perfectly clear that if statements were made by him to Journee on the day after the killing they were not part of the *res gestæ*, and that they were inadmissible. In this case there was no conversation at all by Martin at the time of the surrender, nor did Martini himself undertake to make any statement as to the occurrences of the day before, or to detail any conversation had by him with Martin; all that he did then was to announce a single fact—that Martin was on the spot to surrender.

We have been shown no grounds for setting aside the verdict and reversing the judgment.

The judgment appealed from is affirmed.

No. 11,802.

STATE OF LOUISIANA EX REL. THE MECHANICS AND TRADERS INSURANCE CO. VS. BOARD OF ASSESSORS ET ALS.

While it is true that the actual *situs* of personal property which has a visible existence, and not the domicile of the owner, will, in many cases, determine the State in which same is taxable; that same is true of public securities and circulating notes which have acquired the character of property in the place where they are found, yet that rule only applies to such securities and bonds as are operated in market and have thus acquired a domicile or *situs* there.

This rule finds an exception in the case of an insurance company doing business in another State than that of its domicile, and that it is necessary to purchase bonds of that State and deposit same in the treasury as an indemnity for the payment of its risks therein. Such bonds are the avails and incidents of the insurance business and segregated from commerce, and are, consequently, taxable at the domicile of the company.

A PPEAL from the Civil District Court for the Parish of Orleans.
Theard, J.

John Q. Flynn and W. B. Lancaster for Plaintiff, Appellant.

E. A. O'Sullivan, City Attorney, and Henry Renshaw, Assistant City Attorney, for the City of New Orleans, Defendant, Appellee.

Argued and submitted May 21, 1895.

Opinion handed down November 18, 1895.

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The opinion of the court was delivered by

WATKINS, J. This suit relates to the assessment of relator's property for the year 1893, and is quite similar to the suit of same title bearing the docket number 11,659, and this day decided in favor of the respondent Board of Assessors.

The relator seeks the cancellation of its assessment, which is composed of the following items, viz.:

1. Premiums in course of collection.
2. Bills receivable.
3. Bonds of the State of Georgia.
4. Certain shares of the Standard Guano and Chemical Company and National Acid Company.

In so far as the *first* and *fourth* are concerned, nothing need be said, for the course of reasoning and decision in suit No. 11,659 are strictly applicable and must control our decision in this suit *pro tanto*.

In so far as the bills receivable are concerned, no proof was administered to demonstrate their exemption from taxation, and there is nothing otherwise to show that relator is entitled to the alleged exemption.

With regard to the Georgia State bonds, it appears that they aggregate twenty-eight thousand three hundred and fifty dollars in amount, are the property of relator, and are on deposit with the treasurer of that State.

The rule established in Liverpool and London and Globe Insurance Company (44 An. 760) is that credits due to a non-resident were assessable and taxable at the domicile of the owner; but that decision made an exception in favor of tangible assets and other personal property, and held that same were assessable at their actual *situs*.

But it has never been decided that tangible personal property could not be assessed at the owner's domicile, notwithstanding its actual *situs* was abroad; in some other State or country.

State tax on foreign held bonds (15 Wallace, 300) is not to the contrary; for in that case the court say: "It is undoubtedly true that the actual *situs* of personal property which has a visible existence, and not the domicile of the owner, will, in many cases, determine the State in which it may be taxed. The same is true of public securities consisting of State and municipal bonds and circulating notes of banks. These by general usage have acquired the character

Ward vs. Stakelum.

of and are treated as property in the place where they are found, though removed from the domicile of the owner."

But that decision and others of like character only apply to bonds and other *circulating* notes which are operated in market and are bought and sold.

This is the exact illustration that is given by Mr. Burroughs, for he says that when a person who resides in one State has an agent in another State who loans, or invests money for him on notes or other evidences of debt, and then reinvests the proceeds of the loans in the same State, such notes or evidences of debt are taxable in the latter State. Burroughs on Taxation, p. 60.

But such is not the situation of the bonds of the relator. They are owned by the insurance company, but they are not in circulation. They were doubtless purchased and placed on deposit in the treasury of the State of Georgia, as an indemnity to secure the fulfillment of the company's risks in that State. These are taxable assets here.

The judgment must be amended so as to reject relator's demand *in toto*. It is therefore ordered and decreed that the judgment appealed from be so amended as to reject relator's demand *in toto* at his costs.

MR. JUSTICE BREAUX dissents in this case for the reasons stated at length by him in State *ex rel.* Mechanics and Traders Insurance Company vs. Board of Assessors, No. 11,659, recently decided. *Ante.*, page 1509.

No. 11,876.

JOHN WARD vs. PIERCY J. STAKELUM.

In suits by lessors for possession of the leased premises the law authorizes the citation of defendant to answer after the delay of three days. R. S., Secs. 2155, 2156; 87 An. 843; 44 An. 256.

When the monthly or yearly rent exceeds one hundred dollars the District Court has jurisdiction of such suits. Rev. Stat., Secs. 2155, 2156.

Damages for alleged wrongful conduct of the lessor, in seeking to obtain possession of the leased premises, can not be claimed by reconvention in a suit by the lessor for possession brought under the above cited sections of the Revised Statutes.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Frank McGloin for Plaintiff, Appellee.

Ward vs. Stakelum.

Louque & Pomes for Defendant, Appellant.

Argued and submitted June 24, 1895.

Opinion handed down November 7, 1895.

The opinion of the court was delivered by

MILLER, J. The defendant, sued for the possession of premises held under a lease from plaintiff, appeals from the judgment of the District Court decreeing delivery. The defences are that a three-day citation is illegal; that the City Court, and not the District Court, had jurisdiction; that the premises are not held under the lease, but under a contract disposing of the good will of plaintiff's business, and there is also a claim for damages alleged to have been sustained by plaintiff's proceedings to obtain possession.

The exception as to the citation and the jurisdiction are answered by the statute. It provides for the citation of three days, and for the institution of the suit in the District Court when the monthly or yearly rental exceeds one hundred dollars. See R. S., Secs. 2155, 2156; *State ex rel. Matt vs. Judge*, 37 An. 843; *Godchaux vs. Bauman*, 44 An. 256.

The claim of twenty-one thousand dollars damages alleged to have been sustained by the proceedings of the plaintiff, we do not think can be grafted on a suit for possession of leased premises. The defendant's answer claimed a reformation of the contract of lease, alleging it was made in error for a fixed term, but should have been in perpetuity or for an indefinite period. There was before the lower court the written lease signed by defendant for the term specified; the letter of defendant requesting its renewal utterly inconsistent with his present pretension; and there was also the sale of the good will of plaintiff's business wholly silent as to the lease of the premises. If there had been any contract that defendant should occupy plaintiff's premises indefinitely, in our opinion it would have found expression. Instead, we have the lease executed at the same time as the sale of the good will fixing the term at three years. There is, in our view, no basis to claim the lease was made in error, notwithstanding defendant's testimony, confronted as it is by the written evidence and the plaintiff's testimony.

It is therefore ordered, adjudged and decreed that the judgment of the lower court be affirmed with costs.

Sincer vs. Heirs of Bell.

No. 11,614.

LOUIS SINCER vs. WIDOW AND HEIRS OF M. M. BELL.

The liability arising from negligence constituting the offence or *quasi* offence is to the injured party, but creates no liability one to the other of those to whom the negligence is imputed, hence if one of the wrongdoers pays the resulting damage, he thereby acquires no right of action against the other, least of all if he has settled with the injured party and been discharged from all liability. Civil Code, Arts. 2315, 2316.

Such payment simply discharges the debt of the party who pays, fixed on him by the judgment, hence gives rise to no contribution from the other alleged wrongdoer, as contribution is on the theory that payment by one has discharged another from whom the contribution is due.

The builder erecting a staging for his workmen will not be liable to a subcontractor—i. e., to do the painting of a building, for the damages he is made to pay arising from the fall of the staging which the workmen of the subcontractor choose to use, there being no contract of the builder to furnish them such staging.

Nor will the builder be responsible for such damages to the subcontractor under the articles of the Code that fix on the master or employer, liability for the acts of his servant. Civil Code, Arts. 2317, 2320.

A PPEAL from the Civil District Court for the Parish of Orleans.
Theard, J.

Benjamin Rice Forman and Charles Forman for Plaintiff, Appellant.

Charles F. Claiborne for Defendants, Appellees.

Argued and submitted February 14, 1895.

On the first hearing the judgment of the District Court was reversed.

On rehearing the opinion of the court was handed down November 18, 1895.

The opinion of the court was delivered by

MILLER, J. We have given to this case a re-examination under the light of an elaborate reargument.

It is a suit by plaintiff, condemned to pay damages for negligence, brought against the defendant, alleged to have been a participant in the negligence. The plaintiff and defendant, Bell, charged with negligence, were both sued by the parties claiming to be injured by

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that negligence, the falling of the scaffold on which the parties injured were standing, engaged at the time in the construction of a building. Bell, the defendant, was the contractor; Sincer, the plaintiff, the subcontractor for the painting, and the workmen employed by each were the victims of the fall of the scaffold. The basis of the suit for damages was the defect in the scaffold alleged as the cause of the fall, the fault being charged on both. Bell compromised and was discharged from all liability for the damages.

On the theory that both Simpson and Bell were chargeable with negligence, that would produce a liability to the injured party, but no liability one to the other of the wrongdoers. No obligation of Bell, under such circumstances, can be referred to any *quasi* contract or any offence or *quasi* offence committed by Bell with respect to Sincer. Obligations arise from contracts or *quasi* contracts, or *quasi* offences or the law. C. C., Arts. 1760, 2293, 2294, 2315, 3536; C. P., Arts. 326, 328.

Nor in our view can Sincer derive any action against Bell by the payment of the judgment. That judgment was against Sincer alone, adjudging him liable for negligence. Bell had settled and been discharged by the parties injured. There could be, as between Sincer and Bell, no contribution arising out of that payment, for contribution, when admitted, is on the theory that payment by one discharges another also.

There is a responsibility in damages for the acts of those for whom one is answerable. It follows that a principal compelled to pay damages for the acts of his subordinate has recourse on the subordinate. But this grows out of the relation of master and servant, and no such relation existed between Bell and Sincer. C. C., Arts. 2317, 2320.

The plaintiff, however, earnestly maintains there was the obligation on Bell's part to furnish a safe staging for the painters in doing the painting. We have given attention to this branch of the case, as affording, if the contention was supported, the basis of plaintiff's action. There is testimony that in fixing the price for the exterior painting some allowance was made to Bell in consideration of Sincer being allowed to use the exterior scaffold. But the scaffold that fell was inside. It was the impression of some of the members of this court, derived from the briefs and previous argument, that what was said with reference to the use by Sincer of the staging, extended

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to that inside as well as the exterior staging. We are constrained to yield this impression on a closer examination of the record. The witness who testified on this point, on re-examination, we find, corrected his previous testimony, and stated explicitly the conversation referring to the use of the scaffolding related exclusively to that on the outside. Indeed, the plaintiff himself, as a witness on the stand, placed the use of the scaffolding on the basis of a courtesy, not right, usually extended painters, who, it seems, follow the carpenters in their work. It seems to us the inevitable conclusion from plaintiff's own testimony there was no express contract on which plaintiff could ground this action. We have also given attention to the evidence in respect to the custom on this point. The tendency of the testimony is that painters use the scaffolding put up by the builders. It is also in the record that painters exercise their option as to this, and put up their own staging when they choose to do so. Indeed, from the record of *Roe vs. Sincer* laid before us, in which the present plaintiff was sued by the heirs of the painter killed by the fall, we gather that the effort in his defence was to show the painters were expected to satisfy themselves as to the strength of the scaffolding as connected with the risk they assume. It was testified, too, that the employer furnishes the materials to make the staging if none is left by the builder; that the journeymen are to be the judges of the strength of the scaffold, and that is the custom. There is no intimation in that case of any obligation on the part of the builder to furnish the scaffolding. Of course, there was no issue of Bell's liability. Still, the whole current of the testimony in all the records put before us, in our view, tends simply to show a custom perfectly natural, for the painters to use scaffolding left by the builder. But it is our conclusion no contract on the part of the builder in that respect to the subcontractor for the painting, arises from the custom relied on by plaintiff. We reach the conclusion there was no contract of Bell to Sincer. The question of prescription so elaborately argued is withdrawn from consideration by our determination there was no contract.

It is therefore ordered, adjudged and decreed that our former judgment be set aside, and it is now adjudged and decreed that the judgment of the lower court be affirmed with costs.

Succession of Steers.

No. 11,780.

SUCCESSION OF SCHUYLER B. STEERS.

Where the domiciles of origin and selection are both domestic, the presumption of the revival of intention to return to the domicile of origin does not apply.

The circumstances of residence, the establishment of a business place, the acquisition of a house for a residence, and the declaration of the party and the exercise of political rights, are usually relied upon to establish the *animus manendi*.

A domicile once acquired, is presumed to continue until it is shown to have been changed. To constitute this change, there must be a residence in the new locality, and an intention to remain there. Both must concur and are necessary.

A PPEAL from the Civil District Court for the Parish of Orleans.
Theard, J.

Rouse & Grant for Mrs. Helen C. Evans, Administratrix of Mrs. Kate Clark Steers, Plaintiff, Opponent, Appellant.

William W. Howe for the Executor and Heirs of Schuyler B. Steers, Appellees.

Thos. J. Semmes submitted a brief on Application for Rehearing.

Argued and submitted March 12, 1895.

Opinion handed down March 25, 1895.

Rehearing refused December 2, 1895.

The opinion of the court was delivered by

McENERY, J. Schuyler B. Steers was born in the county of Otsego, State of New York, in 1832. He moved from there to Virginia; thence to Racine, Wisconsin; to Columbus, Mississippi; to Shreveport, Louisiana, in 1869 or 1870, and to the city of New Orleans in 1876.

He married Mrs. Kate Clarke, who died June 1, 1888, in Otsego county, and her succession was opened there and also in New Orleans. Her sister, Mrs. Helen Clarke Evans, was appointed administratrix of her succession in Louisiana April 4, 1898.

Schuyler B. Steers, the husband, died in Otsego county December 13, 1899. He left a will which was there probated. He lived in

47	1551
48	923
47	1551
109	1097
47	1551
110	673
47	1551
121	881
47	1551
123	636

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New Orleans, engaged in commercial or manufacturing business many years before his death and acquired a large amount of property while residing here.

A copy of his will and a record of its probate in Otsego county were presented and filed in the Civil District Court, parish of Orleans, by Frederick A. Savile, executor, and its execution ordered and letters testamentary were issued to him.

Savile, the executor, filed an account, and Mrs. Evans, administratrix of the succession of Mrs. Steers, filed an opposition, alleging that the executor had failed to account for rents and revenues derived from real estate belonging to said succession, and for the share of Schuyler B. Steers in the partnership of which he was a member. She also claimed that Schuyler B. Steers was indebted for the paraphernal funds of his deceased wife, which he had converted to his own use and which were administered by him, and for promissory notes, shares of stock in various corporations, which formed a part of the community existing between him and his deceased wife, which were converted by him after the death of his wife. The prayer in the opposition was in accordance with the averments in the petition.

After the filing of her opposition Mrs. Evans brought a separate suit against the executor, alleging the domicile of Schuyler B. Steers to have been, at the time of his death, in the city of New Orleans. The averments in this separate suit are similar to those in the opposition, and the prayer is that the share of Mrs. Steers, deceased, in the community be fixed and determined.

The answer of the executor denied that Steers was domiciled in New Orleans, and that there was any community existing between him and his wife, or the conversion of paraphernal funds, stocks, etc., or of any indebtedness to his deceased wife's succession.

Mrs. Martha Perry and others, alleging themselves to be heirs of Mrs. Steers, intervened and joined the executor in resisting the claims of plaintiff and appellant. There was judgment for the intervenor and the opposition to the account was dismissed.

As to the immovable property acquired in Louisiana during the marriage, the *lex rei sitæ* will govern. Story, Conflict of Laws, par. 428; 20 Johns. 267.

The evidence shows this to be incumbered, and there is no controversy as to the eventual interest of the heirs of Mrs. Steers in the property.

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If, as contended by the executor, the domicile of Schuyler B. Steers was in Otsego county, at the time of his wife's death, the personal property followed the law of the domicile, and it passed to the husband as a legal assignment by operation of the law of the domicile, and which is recognized extra-territorially. *Id.*

The most important fact, the only one at issue that can be determined, is the domicile of Schuyler B. Steers at the time of the death of his wife. There is no difficulty in ascertaining what the law defines as a domicile. It is the place where a man has his true, fixed and permanent home, and to which, when he is absent, he has the intention of returning. *Tanner vs. King*, 11 La. 175.

The main question to decide is where a person has his home, in the language of the Code his "principal establishment," and where he exercises his political rights.

Domicile may be either national or domestic. The former is one in which nationality a man is domiciled, and the latter in which subdivision of the nation. And in this respect the law of domicile in Louisiana, in relation to its different political subdivisions, may be applied to the change of domicile from one State to another.

In not keeping in view the distinction between the two kinds of domicile, in some cases in this country, the domicile of birth, as recognized in England, has been given too much weight in estimating the value of the floating intention to return to the first domicile. The conditions which control the destinies of families in the two countries are materially different. In one it is a rule to keep families together. They grow up for generations on the same spot. Local traditions control them, and there is not entirely obliterated some influences of the feudal period. Here the customs, the habits of the people; their ceaseless energies, their continuous change from locality to locality, the sudden and dense population of new places, the desertion and abandonment of old ones, all show that the people are migratory, and not much influenced by birth, locality, or the local history of families.

Hence, we conclude that it will require the same facts only to show a change of domicile from the domicile of birth that it would require to show a change from one selected domicile to another. The revival of the intention to return to the domicile of birth does not apply when the domicile of origin and of selection are both domestic. *American Leading Cases*, 714.

Succession of Steers.

To change from one domicile to another there must be an intention to abandon the former domicile. A residence merely is not sufficient, as this may be for special purposes, such as for health, for recreation, for commercial purposes. The nature of the residence may rebut the presumption of the *animo manendi*. The intention to make a place his permanent home may exist, but this is not sufficient to establish a domicile unless the intention is accompanied by some act in furtherance of such intention. 5 Pick. 370; 5 Md. 186.

We have no concern with the residence of Schuyler B. Steers in Virginia, Wisconsin or Mississippi. The question is was he domiciled in Louisiana at the time of the death of his wife on June 1, 1888?

In determining this fact we will proceed on the presumption that the law favors the continuance of domicile. 21 Penn. 106; 5 Pick. 370.

And that the original domicile continues till it is finally changed for another. Story Conflicts of Laws, par. 481; 10 N. H. 156; 10 Pick. 77; 1 Texas, 673.

Applying the law to the facts in the record, we are to ascertain whether Schuyler B. Steers acquired a domicile in Louisiana, and if so, did he abandon it, and acquire a domicile in Otsego county, New York.

The character of the residence can form no important part in fixing the domicile, unless it is of that character which rebuts the presumption of a fixed intention to remain.

It is, therefore, immaterial whether he lived in a hired house, boarding house, or his own dwelling. If it was his intention to permanently remain in Louisiana and his declaration and his acts show that he intended to remain for an indefinite period, as a place of *present* fixed domicile, it will constitute his domicile, though he may have had an idea, at some future time, of returning to the original domicile.

The civil law attaches almost equal importance to the place of business, and of residence, as fixing the place of domicile. Story Conflicts of Laws, par. 42.

But we think it more in keeping with our social conditions and political systems to accept the rules of the common law, to fix the domicile of a person where he has his home, and exercises his poli-

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tical rights. Such in fact is the concurrence of the decrees of the courts of this State.

While the presumption of original domicile continues until fixed elsewhere, when a person has acquired a residence elsewhere, this will be presumed to be his domicile until the facts establish the contrary. 2 Kent, 532.

Steers came to Louisiana in 1870 and located at Shreveport, lived in boarding houses, and also kept house, but did not purchase resident property. He bought and sold property. In the acts of sale he was described as being "of the city of Shreveport." He voted once there. In 1876 he came to New Orleans and engaged in the business of manufacturing and selling cotton presses. He lived here at boarding houses; kept house at one time on St. Charles avenue in 1885, and finally, with his son-in-law, purchased a residence in 1887, and with him kept house in New Orleans. The purchase price of the house and the household expenses were paid, two-thirds by Steers and one-third by his son-in-law, Savile. The inventory shows that his house was well furnished, indicating that it was prepared for a permanent residence. The inventory taken of the property, at which Savile, the son-in-law and executor, assisted, describes all the property, movable and immovable, in the succession, which amounted to some \$80,000, as belonging to the community existing between Steers and his deceased wife. At the general election, 17th April, 1888, Steers registered and voted in the city of New Orleans. In all the public acts of sale passed to Steers of the property purchased in New Orleans, he is described as "being of this city." This declaration, of course, means that he resided in the city. All his acts and declarations go to show that he was identified with the interests of the State and regarded it at least as his *present* fixed domicile.

That the deceased contemplated going back to Otsego county at some future time, there is little doubt. He spoke of it as early as 1881, and in 1888 he bought a place called Lakeland, and fixed it up in a manner that would indicate that he expected, at least, to spend his declining years there. He was in the habit of going to Otsego county every summer, but would return to New Orleans in the fall or winter, and sometimes during the summer, to transact his business. That he and his wife were fond of the place, Lakeland, the evidence discloses, and that Mrs. Steers regarded it as a home is certain. In

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reference to the declarations which were offered in evidence to show the intention of making that the domicile of Steers, we are furnished principally those of Mrs. Steers, who, it appears, had no kindly feeling for the people of the South, or of the climate of this latitude. Steers, on the contrary, liked it, at least to the extent of its promoting his health, and it is not unreasonable that he should have said he liked the people among whom he had prospered. His will was made before the death of his wife in Otsego, in which he declared himself a resident of that county, and it was probated there. But this probate was after the death of his wife, whose heirs contend that at the date of her death he was domiciled in New Orleans. He voted in Otsego county 6th of November, 1888, and this act also was after the death of his wife.

Comparing and analyzing the testimony in the record, we are of the opinion that on the 1st June, 1888, Schuyler B. Steers had his domicile in the city of New Orleans. It is not to be disputed that the intention may be afterward grafted upon the temporary residence in order to fix the domicile. It is not to be disputed that Schuyler B. Steers had in the beginning a temporary residence in Shreveport, and his voting there, and his declarations in public acts may be received as evidence of his intention to make Louisiana his adopted State. And his declarations in seven public acts as to his residing in New Orleans, and his voting at the general election in 1888; his long residence in the city, and his manufacturing business being located there, all show, we think, conclusively, that he regarded Louisiana as his adopted State and the city of New Orleans as his domicile.

Under the Constitution of 1868 it was required that a voter should be a resident of the State. A registration certificate was requisite to entitle one to exercise the right to vote, and to this a sworn statement was made as to residence. When Steers voted in Shreveport he, *under oath*, declared that he was a resident of Louisiana.

Under the Constitution of 1879 the voter must be an *actual* resident of the State.

The fact to which Steers made oath when he obtained his registration certificate, upon which he voted, was that at the election he would be a resident of the State at least one year. The facts furnished the registrar of voters by him, to obtain the certificate, were that he resided at 220 First street; kept house there, was a manu-

Succession of Steers.

facturer; had resided in the State twenty-five years, in the city of New Orleans twenty-five years, and this statement was signed by him.

These acts of voting were not impulsive. They were the result of deliberation. He had ample opportunity to reflect, as he had to prepare for voting, by obtaining a certificate which would entitle him to the privilege. Voting may not be conclusive evidence of domicile, as it may be shown that the vote was fraudulently cast. But when there is no question of fraud, and it is the act of the party, supported by his oath, as to the right to vote, it is an important fact, in connection with residence, to fix the intention as to domicile. *State vs. Steele*, 33 An. 910; *McKowen vs. McGuire*, 15 An. 639.

And the same may be said of repeated declarations in public acts as to residence. *Sanderson vs. Ralston*, 20 An. 312.

A person may have a residence in one place and a domicile in another. He can have several residences, but only one real domicile. 33 An. 910, cited above.

Under the definitions of domicile in the Code we think Steers' principal establishment was in New Orleans, where he was surrounded with his family, in a residence fixed with all the comforts of life, where his only business was conducted and where he exercised all his political rights, and in which place he had resided the greater part of each year for twelve years.

Lakeland had been purchased, no doubt, for temporary residence during summer, and which he had probably an intention of making his permanent home, as, according to the statements in the record, he was meeting competition in business by other patents claiming to be superior to his cotton press, and he may have regarded his business as closing its career.

But prior to June 1, 1888, he had done no act to carry the intention into effect. There is not sufficient evidence in the record that he had abandoned New Orleans as his domicile. After he purchased Lakeland he continued to reside in New Orleans the greater part of the time, and the fact of his voting in said city is an evidence that in April, 1888, he had not then fixed his domicile in Otsego county.

If the declarations of Steers in the act of mortgage on the Lakeland place, and the bonds secured by it, to the same effect, that Lakeland was his home, they are rebutted by his continued residence in New Orleans and the exercise of his political rights.

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It is certain he could not acquire a domicile elsewhere while he continued to reside in New Orleans, keeping up his home, his business, and exercising his political rights. During his residence in New Orleans all the circumstances usually relied upon to establish a domicile occurred—his repeated declarations, the payment of personal taxes, the establishment of a place of business, the acquisition of a home and the exercise of political rights (*Mitchell vs. United States*, 21 Wal. 350). Having acquired a domicile in New Orleans, it is presumed to continue until it is shown to have been changed. The facts do not show that he acquired a new domicile in Otsego county, New York. It is not shown that he resided there with the intention to remain permanently. *Id.*; *Fidelity Trust and Safety Vault Company vs. Preston*, 28 S. W. Rep. 858.

The facts in the record do not enable us to issue any decree as to the amount of the community interest of the opponents. The partnership in which the deceased was a member has not been settled and there are many outstanding claims against the succession. Nor are we able to issue a decree in relation to the paraphernal funds of Mrs. Steers, alleged to have been converted by the husband. It seems that she received \$5500 from her father's succession, but we find no evidence that it went into the hands of the husband. She owned some shares in compress companies, but as those shares were acquired during the community, we are unable to say how or in what manner they were acquired by Mrs. Steers, whether purchased by her with paraphernal funds, or given to her by her husband in payment of paraphernal claims.

The residuary interest in the community of the heirs of Mrs. Steers can only be ascertained by a settlement of the succession in New York and in Louisiana.

It is therefore ordered, adjudged and decreed, that the judgment appealed from be avoided and reversed, and it is now ordered, adjudged and decreed, that a community of acquets and gains existed in Louisiana between Schuyler B. Steers and his wife, Mrs. Kate Steers, during the period of their residence in Louisiana to June 1, 1888, and that the plaintiffs and appellants, heirs of Mrs. Steers, be recognized as entitled to the residuary interest in the community, which would have gone to Mrs. Steers.

It is further ordered, that the rights of said heirs, opponents and plaintiffs, be reserved as to the paraphernal funds and separate

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property of Mrs. Steers, alleged to have been converted by her husband and the executor.

It is further ordered that this case be remanded to be proceeded with in due course of law; appellee to pay costs of appeal.

No. 11,851.

S. B. DENEGRÉ VS. BUCHANAN & DONAN.

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4104 715

When an apparently valid and regular adjudication to the State has been suffered to remain on the public records for several years, unchallenged by any party in interest, it will constitute a sufficient basis for a proceeding under the act of 1890, enacted in pursuance of the provisions of the delinquent debt ordinance, notwithstanding said tax deed is shown by proof at the trial not to have been actually signed by the tax collector.

A purchaser at said subsequent tax sale will be protected by the showing on the conveyance records exhibiting a title to the State; and such record is sufficient to authorize the proceedings and sale by the tax collector.

A PPEAL from the Sixth Judicial District Court for the Parish of West Carroll. *Ellis, J.*

*Joseph E. Ransdell and Gray & McIntosh for Plaintiff, Appellant.
C. T. Dunn for Defendants, Appellees.*

Argued and submitted June 12, 1895.

Opinion handed down June 21, 1895.

Rehearing refused December 2, 1895.

The opinion of the court was delivered by

WATKINS, J. Mrs. S. B. Denégre, widow of J. D. Denégre, deceased, alleging herself to be the owner of a tract of four thousand one hundred and twenty acres of land which is in defendants' possession under a tax title, sues for its annulment and revocation, and prays a decree placing her in possession thereof.

In answer defendant alleges his title is perfect and complete, and in the alternative pleads the prescription of three and five years *liberandi causa* as to all the badges of nullity alleged in either the tax proceedings or sale proceedings, and the prescription of ten years *acquirenda causa* as a muniment of title. And defendant's further prayer is that, in the event of an adverse judgment, he have

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judgment for the amount of taxes paid since his acquisition of the property.

On the trial there was judgment in defendant's favor, rejecting the plaintiff's demands, and the latter has appealed.

Various charges of nullity are preferred against the tax title through which the defendant claims to have derived ownership of the lands in dispute. A fair synopsis is as follows, viz.:

That defendant claims the property by virtue of a pretended sale made by W. W. Bradley, sheriff and *ex-officio* tax collector, on the 1st of April, 1881, as per deed recorded in the book of conveyance. That at the time the said tax collector sold said property it was claimed by the State by virtue of a pretended adjudication made by R. K. Anderson, tax collector for the parish of Carroll, on the 4th of November, 1878, as per deed recorded in the conveyance office of West Carroll parish.

That said last mentioned adjudication to the State was absolutely null and void, for the following reasons, viz.:

1. That the advertisement of the land for sale for taxes did not appear three times within ten days, as the law required.

2. There was no previous publication of the delinquency of the taxes during the time required by law.

3. There was no notice given to the owner to pay the taxes prior to the pretended sale.

4. There was no seizure of the property by recording a description thereof in the book of mortgages.

5. That the property was sold for the taxes of 1866, 1867, 1868, 1869, 1870 and 1871, whereas tax collectors could not sell for back taxes beyond two years.

6. That the owner of the property was an absentee, and domiciled in a distant parish of the State, for whom no curator *ad hoc* was appointed, as the law required.

7. That no title was ever confirmed by the Auditor, as required by Sec. 9 of Act 47 of 1878.

8. That the property was assessed and sold in block, whereas Sec. 63 of Act 42 of 1871 required land sold for taxes to be offered and adjudicated in lots of not less than ten and not more than fifty acres, in accordance with Art. 132 of the Constitution of 1868.

9. That the assessment is absolutely null and void as to 960 acres in sections 14 and 15 township 21 of range 9, for the reason that the

land in section 14 is described as being in section 29 instead of section 21; and that the land in section 15 is described as being in township 26 instead of section 21—there being in truth and fact no such township as 26 and 29 in the parish of Carroll.

10. That the property was assessed to J. D. Denégre, and was sold for taxes due by the estate of J. D. Denégre.

From the foregoing alleged nullities, the petition alleges the State had absolutely no title resulting from said adjudication, and the State was without power to convey any title to the defendant.

Of the adjudication made to defendant by Bradley, tax collector, in 1881, the plaintiff's complaint is, that the lands in controversy were advertised in block in a confused mass with a large body of other lands situated in East Carroll parish, and were consequently charged with taxes due on the whole body.

The further charge is made that there was an error as to the description of two hundred and forty acres of land.

By an amended petition plaintiff affirms that her allegation to the effect that the State acquired an apparent title from the tax collector in 1873 was in error, the fact being that the record does not show a deed in proper form, the one on record lacking the signature of the tax collector; and for that reason is not entitled to full faith and credit.

Thereupon the plaintiff's averment is, that there never was any adjudication to the State by R. K. Anderson in 1873 of the lands in controversy; and that "his attorney was led into error by the fact that the aforesaid document, as recorded in the parish of Carroll * * * purports to have been signed; and as the record purported to be a true copy from the book of conveyances of East Carroll parish, he took it for granted that same was correct, and that the deed had been signed by Anderson, until the testimony of J. D. Tompkins, clerk of East Carroll parish, was filed herein on the 7th of August, 1894."

In answer to this amended petition defendant shows that Anderson, tax collector, sold on the 4th of November, 1873, the lands in controversy to the State of Louisiana, and made and executed a good and valid title thereto, which was legally recorded. And it further shows that the same lands were sold in April, 1881, under Act 107 of 1880, and under the ordinance for the relief of delinquent taxpayers, and was purchased by the defendant, whereby he acquired a good and valid title thereto.

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This answer is supplemented by a reconventional demand for taxes paid and interest, which may be subsequently considered.

It is our view that, under the supplemental petition averring that there "*never was any adjudication to the State*" of the lands in controversy, all of the charges of nullity alleged to exist in the deed of the tax collector in 1873 are necessarily abandoned and eliminated from the case. This supplemental petition was inadmissible otherwise than on the theory assigned that the admission of the existence of a title was made in error of fact.

The plaintiff must, consequently, stand or fall upon the allegation of her amended petition.

The question is, in what manner or degree does this change of base affect the defendant's title?

Considering the plaintiff's admission in her supplemental petition "that the aforesaid document"—the deed of Anderson, tax collector, in 1873—"as recorded in the parish of East Carroll, purports to have been signed," how is the *status* of defendant's title in 1881 affected?

In our opinion, most materially. Forasmuch as a title to the State, apparently signed by a tax collector and perfectly regular in form, had remained on the public record unchallenged by any person in interest for so many years, was certainly sufficient warrant for Bradley, tax collector, to proceed as he did, to advertise the lands in 1881, as lands which had been, theretofore, forfeited to the State for unpaid taxes of previous years. It afforded perfect and complete immunity to the defendant in becoming the adjudicatee at the afforesaid tax sale.

The fact of a deed to the State having remained so long unchallenged by any one; and the property being thereby subjected to sale as property which had been forfeited to the State; and the tax purchaser's title having been recorded thereafter for more than ten years, it is too late for the plaintiff, in 1894, to question its validity.

It may be true that Anderson, tax collector, did not, either accidentally or intentionally, sign the act of sale, evidencing the adjudication; but of what possible consequence can that be to the defendant, who became adjudicatee at a tax sale made eight years after the registry of such a title, apparently signed and regular.

This court has frequently held, that in making seizure and assessments, a tax collector is bound to inspect the public records in order

to ascertain therefrom in whose name the property now stands recorded. *Prescott vs. Payne*, 44 An. 650.

But inspection is *all* the law requires. No other or further duty is imposed upon that officer.

Having made an inspection, and finding a deed to the State of record, the tax collector was authorized to accept the information the record afforded, and advertise the property for its delinquent taxes due prior to 1880, and assessed against it while standing in the name of the State.

There can be no serious question raised as to the regularity or validity of these proceedings.

In so far as the question of *irregularity* in the proceedings leading up to the sale in 1881 are concerned, it is only necessary to say that they are entirely inadmissible, under the interpretation which this court has given to the healing and curative statutes, in the Lake and Douglas cases, and others of equivalent import. The complaints relate to purely *formal matters* not appertaining to the original assessment of the property, as in the *Augusta* and *Fairex* cases. Of course property assessed in the name of an owner deceased *since* the assessment must be collected in the name of the *estate* or the legal representatives of the decedent.

They could not be collected otherwise.

Under this state of facts, there is no occasion to apply the rules of prescription, notwithstanding that it is our impression that either five or ten years' prescription is good. *Giddens vs. Mobley*, 87 An. 417; *Barron vs. Wilson*, 39 An. 403.

For, notwithstanding the property was adjudicated to the State for taxes in 1885, the defendant subsequently exercised his right of redemption, and reinstated his title. So long as the right to exercise redemption remains to the owner, the alienation remains inchoate, and the legal title, as well as possession, remains unimpaired.

Judgment affirmed.

No. 11,751.

ANTONIO MONTELEONE vs. ROYAL INSURANCE COMPANY OF LIVERPOOL AND LONDON.

When proofs of loss are furnished and a negotiation follows between the assured and insurer, ended by a disagreement as to the basis for the adjustment of the loss, it will be no defence to a suit on the policy that plans and specifications

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48 1172
47 1563
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116 333

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were not furnished by the insured, it being apparent that if furnished there would have been no solution of the difference and suit was inevitable. Wood on Fire Insurance, 414 *et seq.*

The condemnation and prohibition of any attempt to repair a building made unsafe by injuries from fire, is within the police power of the city. City Charter 1882; Act No. 20, Secs. 7 and 8.

When the building insured is so injured by fire as to be made insecure and a menace to life, is condemned by the proper authorities and an attempt to repair it is prohibited by them, the insured may claim a total loss, although the building when insured was not sound. Wood on Insurance, Secs. 445, 446; May on Insurance, Sec. 433; 127 Mass. 309; 19 Wall. 640; 11 Mich. 446; 54 Cal. 450; 18 S. W. Rep. 337; Am. Dig. for 1893, 2171, No. 316.

In such case the indemnity of the insured is not useless repairs, but the value of the building.

An insurance on front and rear building covers connecting walls. Wood on Insurance, Sec. 474; 2 La. 507.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Horace E. Upton, Anatole A. Ker, and L. F. Bouchereau for Plaintiff and Appellee:

Evidence that the company's adjuster made an offer to compromise the claim for insurance is admissible to show waiver of proof of loss. (Sup. Ct. of Pennsylvania) *Dwelling House Ins. vs. Gould*, 19 Atlantic Reporter, Vol. 19, pp. 793 and 795; 16 Atlantic Reporter, 22.

Ligon et al. vs. Equitable Fire Insurance Company, Southwestern Reporter, Vol. 10, pp. 768 and 769.

If, after the insurer has commenced to rebuild, he is interfered with by the public authorities and prevented from completing his work, or the building is ordered to be taken down as dangerous, although its dangerous character was not attributable to the fire, the loss will be his; nor will he be excused from paying the insured the entire amount of his loss, according to the agreement to rebuild or repay. May on Insurance, Sec. 433, p. 535, and authorities cited.

The city government has the power to cause the danger which threatens the public from unsafe walls to cease. 97 U. S. 25; 98 U. S. 659; 10 An. 227; 4 An. 477; 34 An. 496; Dillon on Municipal Corporations (3d Ed.), Sec. 141, pp. 163 and 167.

"Whatever may have been the defects in said building before the fire, the owner still enjoyed the privilege of using it as a build-

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ing, and was actually engaged at the time of the fire in making improvements upon the interior, under permission from the city authorities. It would seem, therefore, that, in the opinion of the city authorities, while it was sufficiently safe before the fire to be allowed to stand and to permit of interior embellishment, it was not sufficiently safe after the fire to permit of repairs involving the taking down and reconstruction of a party wall, disintegrated by said fire.

“It is manifest, therefore, from any view of the case, that the owner might still be occupying his building if it had not been for the fire, and that it was the fire alone which deprived him of the use of said building, and that it was either the fire alone or the fire and pre-existing defects combined, which finally deprived him of his property, and in either case the defendant is liable.

“For, as it has been held, it was not alone the material of which the house was built that was insured, but it was that material existing in the shape of a house, habitable, susceptible of being used and occupied as a house.” *Hamburg-Bremen Fire Ins. Co. vs. Garlington*, 18 S. W. Reporter, pp. 337-338, Supreme Court of Texas, 1886; *Brown vs. Royal Insurance Co.*, 1 Ellis & Ellis, p. 853, Queen’s Bench (1859); *Brady vs. N. W. Insurance Co.*, 11 Michigan, pp. 445, 446 (1863).

Farrar, Jonas & Kruttschnitt for Defendant, Appellant, cite: 38 An. 1; 42 An. 49; *Tiedeman on Lim. Police Power*, Sec. 1229, p. 440; *Sedgwick on the Measure of Damages*, Vol. 2, Sec. 722.

Argued and submitted April 10, 1895.

Opinion handed down April 22, 1895.

Opinion on rehearing handed down November 18, 1895.

The opinion of the court was delivered by

MILLER, J. The plaintiff claims payment of ten thousand dollars, the amount of the policy of insurance issued by defendants on the plaintiff’s property, destroyed by fire, the peril insured against. The defence is that plans and specifications required by defendant as

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part of the proof of loss were not furnished, that the risks were increased after the insurance without the consent of the insured, and a denial of the damage alleged to have been caused by the fire.

It is in proof that proofs of loss were furnished, and there were negotiations between the parties in reference to the amount the defendants should pay. The real question was, whether the payment should be an amount sufficient, the defendant claimed, to repair the building insured, and put it in the condition it was before the fire, or whether the value, as in case of total loss, as demanded by the plaintiff, should be the indemnity under the policy. The discussion ended with the denial of liability, except for repairs. In view of this discussion and efforts to adjust the loss resulting in a difference which admitted of no settlement by any papers supplementing the proofs of loss, we think the defence fails that plans and specifications were not furnished. Wood on Fire Insurance, Sec. 414 *et seq.*

The building, three stories, adapted for stores as well as for dwelling purposes, was partly occupied at the time of the insurance. The uses of the building were indicated by the policy describing it as occupied by stores and dwellings. When the fire occurred there were in the building a barber shop, a shoe-fitting establishment not using machinery, and portions of the premises were devoted to other shop purposes not in our view differing materially from the uses specified in the policy. In our opinion, the risks of fire were not sensibly increased by the kinds of business carried on in the building when the fire occurred, and the circumstance that an additional or increased premium of insurance was demandable, by reason of the nature of the occupancy, not of a dangerous character as it seems to us, does not of itself sustain the defence of increased risk. Wood, Secs. 226, 243.

The serious question in this case is as to the amount of the loss. The building was old, and the copious testimony as to its walls, flooring, joists, openings and in other respects, produces the conviction that when insured the building was not sound. It was seriously affected by the fire, both by the flames and falling debris. The party wall was so injured as to be useless; that portion dividing the yards was inclined; the wall opposite the party wall, that is, in the Customhouse side was strained; and there is testimony the cross walls leaned and the joists were charred. Of course, the injuries by the fire were the more serious because of the condition of the premises before requiring, it seems, girders and other appliances to hold it

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together, and it is in proof that at the time of the fire necessary repairs were being made. The current of the testimony is the building was old and frail before the fire, one of the witnesses testifying it was unsafe and that it was so injured by the fire as to make it insecure, even with the repairs possible to be made. In this condition the building was condemned by the City Engineer, and there was a refusal on the part of the city authorities to permit any repairs. The public safety, in their opinion, required the building should be rebuilt.

In this condition of the record, it is urged on us by the defendant that the building could have been repaired so as to make it as good as before the fire, and the cost of these repairs should be the measure of the recovery. There is a mass of testimony as to the practicability of such repairs, or their efficacy, if made or attempted. There is testimony to the effect the building was injured to such an extent as to be beyond repair. On the other hand, it is testified, on behalf of defendant, that the party wall taken down and rebuilt, anchors introduced connecting the walls, strips of new flooring supplied, with other work on ceilings, cross walls, would put the building in the same condition it was before the fire. The qualification of all this kind of reparation, not to be accomplished without large expense, is that after all, as we gather from the record, the result what would be what the witnesses term a "fire job," sufficiently expressive, but made clearer by the testimony of defendant's witness: that the building, with all the proposed repairs, would still be unsafe.

The police power of municipal corporations, to guard against unsafe buildings by ordering their demolition, will not be questioned. Its exercise may be erroneous and the power may be abused, but still it exists subject to judicial control. But courts should not interfere with it unless on very clear grounds. In this case there is the condemnation of this building by the City Engineer; the action of the Mayor for the enforcement of that condemnation; the prosecution of the owner, the plaintiff, for non-compliance, and finally the refusal of the city authorities to permit attempted repairs of a building deemed a menace to life. The defendants claim all this action of the authorities was illegal, and not to be considered in determining the question of liability under the policy. Conceding the action was not conclusive, we are remitted to the issue of fact as to the condition of the building, and our conclusion from the record is, that no repairs would have furnished a safe building.

There is thus presented the question whether the indemnity to the assured for a loss by fire is to be found in the estimated cost of repairs, which, if made, would not give him a secure building, and when, too, the authorities prohibit the repairs. Can the assured be required, under the repairing clause of the policy, or under any view, to accept that species of indemnity? Are not all insurance policies, and their reservations as to repairing buildings injured by fire, subordinated to the public safety, and the police power securing the public against insecure building and dangerous constructions? Irrespective of all considerations of the public safety, is not the assured entitled, under any interpretation of the policy, to some other and better indemnity for a loss by fire than the cost by repairs on the building that cannot be made safe by any repairs? A total loss may be claimed though the walls of a building stand, and the elements that composed it be not entirely consumed. It is the same, we think, when the insured building can not be made secure by repairs. Nor will it make any difference in such cases of constructive total loss, that the condition after the fire is due, in part, to causes existing before. Such causes are deemed the remote, not the proximate causes of the loss. The insurer taking a risk on an old, and in this instance, an insecure building, incurs the obligation to pay for a total loss if the injuries by the fire, combined with antecedent defects, make repairs impracticable. The value of the old building at the time of the fire is the measure of the indemnity promised by the policy. Recognizing this measure as applicable in this case, we understand it to be not disputed, the lower court has adopted the minimum valuation of the witnesses. *Wood on Fire Insurance*, Secs. 445, 446; *May on Insurance*, Sec. 433; 18 *South Western Reporter*, 337; 54 *Cal.* 450; 127 *Mass.* 309; 11 *Mich.* 446; 19 *Wall.* 640; *Am. Dig.* 193, p. 2671, No. 316.

The defendant contends against any liability for injury to the wall between the yard and the adjacent premises. The insurance was on the main and rear buildings. We are not furnished with any authority excluding under such a policy injury to the connecting or yard walls. It would seem that a policy on buildings front and rear should be deemed to include appurtenances as walls. *Wood on Fire Insurance*, Sec. 474; *Workman vs. Insurance Company*, 2 *La.* 507. There is no issue made in the discussion as to the value of the debris of the old building used, as we infer, by the insured, and though

the insured is held for a total loss. We have been called on to deal only with two standards of liability, that of repairs, which we can not adopt, and that of valuation of the insured building, as to which there seems to be no dispute. The insured suggests that there should be, in any event, an allowance for one half of the value of the party wall, not insured. We understand his right against the adjacent proprietor for that half would pass by subrogation. 2 Wood, Sec. 500. Still there is no objection to make the reservation of the right.

It is therefore ordered, adjudged and decreed that, reserving the defendant's right to claim of the owner of the property adjacent to the premises insured the amount he may owe for the party wall, the judgment of the lower court be affirmed.

ON REHEARING.

WATKINS, J. The following are the grounds of defendant's motion, viz.:

1. That there is error in the said opinion, in so far as it holds that there was a constructive total loss of the buildings described in plaintiff's petition as the consequence of fire; that the fact and truth was and is, that any loss suffered by plaintiff in the premises, and due to fire, can easily be differentiated and separated from the loss due to the general bad condition of his buildings; to their age, consequent infirmities and defects, and to the consequent necessity, as found by the court, of tearing down the same after the fire alleged to have been the cause of all the loss suffered by plaintiff.

2. That there is error in the opinion of the court in that it finds that the lower court adopted the *minimum* valuation of witnesses as to the value of the premises described in plaintiff's petition, whereas in truth and in fact both the lower court and this court adopt the *maximum* valuation, and that the finding of the court as to the measure of damages is erroneous, even if defendant and appellant is to be held liable for the value, at the time of the fire, of all the buildings and constructions described in plaintiff's petition.

3. That there is error in said opinion in holding that the defendant and appellant should be mulcted in the value of one-half of the party wall, which did not belong to the plaintiff at all, and for which, as appears from the record, he has already instituted suit against third persons.

4. That there is error in the opinion of the court in so far as it holds the insurance company liable for the value of the yard wall, the value whereof is expressly excluded from consideration under the terms of the policy sued on.

1. Was there "a constructive total loss of the buildings described in plaintiff's petition as the consequence of the fire?"

Is there error in our opinion in this respect?

Defendant's counsel put their proposition thus:

"Upon the first point then we respectfully submit that the court should, as the first element in deciding upon the amount of plaintiff's recovery, fix upon the value of the property forming the subject-matter of the total loss which, if you assume the whole of the front building to be lost, will be somewhere between three thousand dollars and five thousand three hundred and thirty-three dollars and thirty-three and one-third cents. And taking those figures as a starting point, then deductions or additions should be made according to the views of the court upon the following propositions:

"The burden of proof was upon plaintiff, and he has failed by a fair preponderance of proof to show that the loss is as high as the second-named figures. To give him the average of the two, or four thousand one hundred and sixty-six dollars and two-third cents, is more than fair. To give him three thousand dollars seems to us the necessary result of the present state of the record." Brief, p. 4.

Consulting plaintiff's petition, we find the following allegations, viz.:

"That your petitioner is the *bona fide* and legal holder of fire policy No. 4,388,896, issued by the (defendant) company for ten thousand dollars, upon the buildings and improvements on the property situated at the corner of Royal and Customhouse streets.

* * * * *

Said buildings and improvements being designated in said policy as consisting of a three-story brick slated building, and rear building attached."

The petition further represents "that, on the 28th of October, 1891, * * * a fire occurred in the premises immediately adjoining your petitioner's above described property, and was communicated to the said buildings and improvements, covered by said policy, and that the effect of the said fire was such that the said buildings and improvements, covered by said policy, were greatly

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injured and damaged thereby; and the loss by said fire to your petitioner was practically a loss and entire destruction of the property insured aforesaid; and your petitioner is entitled to recover on the said policy for the *total loss of the property insured.*"

Therefore, plaintiff's claim is the total loss of all the buildings insured, and his averment is that the loss by said fire "was practically a loss and entire destruction of the property insured;" that is to say there was a constructive total loss of all the property insured.

In our opinion we say:

"The serious question in this case is as to the amount of the loss. The building was old, and the copious testimony as to its walls, flooring, joists, openings, and in other respects, produces the conviction that the building when insured was not sound.

"It was seriously affected by the fire, both by the flames and the falling walls.

"The party wall was so injured as to be useless; that portion dividing the yards was inclined; the wall opposite the party wall—that is, on the Customhouse (street) side—was strained; and there is testimony (that) the cross wall leaned and (that) the joists were charred.

"Of course, the injuries by the fire were the more serious because of the condition of the premises, requiring, it seems, girders and other appliances to hold it together; and it is in proof that, at the time of the fire, necessary repairs were being made. The current of the testimony is (that) the building was old and frail before the fire—one of the witnesses testifying that it was unsafe, and that it was so injured by the fire as to make it insecure, even with the repairs to be made.

"In this condition the building was condemned by the City Engineer, and there was a refusal on the part of the city authorities to permit any repairs. The public safety, in their opinion, required the building should be rebuilt."

After thoroughly reviewing the evidence applicable to the situation just described, the opinion says:

"Conceding the action was not conclusive, we are remitted to the issue of fact as to the condition of the building, and our conclusion from the record is that no repairs would have furnished a safe building."

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Again, the opinion says:

"A total loss may be claimed though the walls of a building stand, and the elements that composed it be not entirely consumed. It is the same, we think, when the insured building can not be made secure by repairs. Nor will it make any difference in such cases of constructively total loss that the condition after the fire is due, in part, to causes existing before. Such cases are deemed the remote and not the proximate causes of the loss.

"The insurer taking a risk on an old and, in this instance, an insecure building, incurs the obligation to pay for a total loss, if the injuries by the fire, combined with antecedent defects, make repairs impracticable."

We have made these lengthy extracts from the opinion as the best means of showing there was a constructive total loss of all the buildings which were covered by the policy.

Neither the statement of the opinion nor the legal principles announced as controlling it, are called in question by counsel for the insurance company, nor is the summary of the proof afforded by the record disputed.

It is our conclusion that there was a constructive total loss of the building described in plaintiff's petition.

II.

Is there error in the opinion in stating that the court adopted the *minimum* valuation of witnesses as to the worth of the building insured?

On this question the opinion says:

"The value of the old building at the time of the fire is the measure of indemnity promised by the policy. Recognizing this measure as applicable to this case, we understand it to be not disputed (that) the lower court has adopted the *minimum* valuation of the witnesses."

The plaintiff sued for ten thousand dollars, the full amount of the policy, and the District Court gave him judgment for eight thousand dollars only; and our opinion and decree affirm that judgment.

At the date of the issuance of the policy—September 20, 1891—the building insured was estimated to be worth ten thousand dollars, the amount of the defendant's risk; and the loss by fire occurred on the 28th of October, 1891—a few days over *one month* intervening between those dates.

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Under this estimation of the value of the property the defendant accepted premiums from the plaintiff and undertook the risk; and under this claim of deficiency in value this court has diminished the plaintiff's recovery by two thousand dollars.

There is in defendant's answer no charge of either concealment or fraud on the part of plaintiff in procuring the insurance at ten thousand dollars of valuation.

On the question of *actual* value of the property, one witness—a dealer in real estate, and well acquainted with the property—said that in 1890 it was worth twelve thousand dollars or fifteen thousand dollars.

The plaintiff, as witness, says it was worth twelve thousand dollars or fourteen thousand dollars.

A contractor states that a duplicate of the building destroyed would cost nineteen thousand nine hundred and fifty dollars.

Another builder and architect placed its value at twelve thousand dollars. He says he considers the value of the old building, at the time he examined it, something like eight thousand dollars.

Another witness, this last one for defendant, states that it would have cost ten thousand dollars to replace the burnt buildings.

In our opinion, we regard this testimony as perfectly conclusive to the effect that the District Judge adopted the lowest valuation and not the *maximum* valuation, as charged.

III.

With regard to the allowance for the party wall being reduced one-half, we think the defendant's claim is groundless, because we have already held that defendant is liable to the plaintiff for a constructive total loss, and he can not be reimbursed for a total loss if one-half of the value of the party wall is deducted from his claim and he be relegated to an action against his co-proprietor for reparation of his loss on that behalf.

Our opinion says: "The insurer suggests that there should be, in any event, an allowance for one-half of the value of the party wall not insured. We understand (that) its right against the adjacent proprietor for that half would pass by subrogation." 2 Woods, Sec. 500.

"Still, there is no objection to (making) the reservation of that right."

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We see nothing in defendant's brief to shake our conclusions on this subject.

If the defendant be responsible under his contract to repair and make good to plaintiff a constructive total loss, it must pay for the party wall, otherwise the remuneration would prove inadequate for the purpose of rebuilding, and the complete measure of its engagement would be unfulfilled.

The remaining question is, whether there is error in our opinion in holding the defendant for the value of the yard wall; that is, the wall which separated the yard of the plaintiff from that of the adjoining yard.

In our opinion we say:

"The defendant contends against any liability for injury to the wall between the yard and the adjacent premises.

"The insurance was on the main and rear buildings. We are not furnished with any authority excluding under such a policy injury to the connecting yard walls.

"It would seem that a policy on buildings, front and rear, should be deemed to include appurtenances as walls." Wood on Fire Insurance, Sec. 474; Workman vs. Insurance Company, 2 La. 507.

Having gone over this case again very thoroughly, we are fully convinced that our opinion and decree are correct and must remain undisturbed.

It is therefore ordered and decreed that our original judgment and decree remain undisturbed.

No. 11,966.

STATE OF LOUISIANA VS. DICK VICKERS.

It is a general rule that a party can not impeach the testimony of his own witness. When a party is *bona fide* surprised at the unexpected testimony of his witness, he may be permitted to interrogate as to previous declarations made by him inconsistent with his testimony, the object being to prove the witness' recollection, and to lead him, if mistaken, to review what he has said.

If the sole effect of such interrogation is to discredit the witness, apart from statutory regulations, such evidence is not admissible. But if the purpose be to show that the witness is in error, it is admissible.

Though the answer of the witness may involve him in contradictions, calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry, as proof by other witnesses that his statements are incorrect would have the same effect.

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111	180
47	1574
114	856
114	850
47	1574
115	747
47	1574
116	41
47	1574
124	136

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When a witness for the State, on the trial states an important and material fact on cross-examination which he failed to state as a witness on a former trial, this omission of the fact from his former statement can not be used as a means of impeaching his testimony directly by the State.

The State can not impeach its own witness by asking irrelevant questions, the object of which is to discredit his testimony.

It is too late on a motion for a new trial to urge objection to the judge's charge, when no instructions on that point were asked and no exception made.

A PPEAL from the Ninth Judicial District Court for the Parish of De Soto. *Hall, J.*

M. J. Cunningham, Attorney General, and *J. B. Lee*, District Attorney, for Plaintiff, Appellee.

John C. Pugh, Goss & Parsons, for Defendant, Appellant.

Argued and submitted November 23, 1895.

Opinion handed down December 2, 1895.

The opinion of the court was delivered by

McENERY, J. Under an indictment for the murder of L. S. Chovose, who was killed by defendant in a difficulty with other parties, the defendant was convicted of manslaughter. He appealed.

The first point made by defendant is, that the State can not discredit its own witness.

A State witness, when cross-examined by the defendant, stated "that his brother had a pistol and handed it to him during the difficulty." On re-examination the District Attorney asked the witness if he had testified on the former trial "that his brother had a pistol and handed it to him during the difficulty."

The prosecution contends that the State was taken by surprise by the answer of the witness to the cross-interrogatories, and "it had the right to contradict him and to destroy the testimony of the witness."

This last statement in quotation marks is found in the brief of the District Attorney, and is too broad and can not be sustained. Apart from statutory regulations, such evidence is not admissible. 56 New York, 385; 29 Cal. 384; *State vs. Schonhausen*, 26 An. 421; *State vs. Thomas*, 28 An. 827.

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The record shows that the trial judge permitted the question to be answered, for the sole purpose of discrediting the witness. On this point the record discloses the following statement by the judge: "As to the question asked W. A. Pearce, the State claimed surprise at the testimony of Peace, and the court believed the claim of surprise well founded; * * * as to the question asked Robert Pearce, the court did not understand that the only object of the question was to impeach and discredit the witness, although it was admissible for that purpose on the same ground of surprise at his testimony about the pistol, although he was not sworn at the former trial."

From the bills, we understand that the testimony of both witnesses, W. A. Pearce and Robert Pearce, was to a fact not disclosed on the former trial, and at the Coroner's inquest. W. A. Pearce was a witness at the inquest and on the trial; Robert Pearce did not testify on either of these occasions. With reference to the question propounded to the first witness, its object was to discredit his testimony.

It is a general rule that a party can not impeach the testimony of his own witness. 26 An. 421; 28 An. 827.

The exception is that he is sometimes permitted, in cases of hardship, when the testimony of the witness is unexpectedly unfavorable, to contradict him by other evidence to the issue in the case. 1 Stark Ev. 147; 1 Greenleaf Ev., pars. 442, 443; 3d Rice on Evidence, p. 373; State vs. Simon, 37 An. 569.

And where a party is *bona fide* surprised at the unexpected testimony of his witness he may be permitted to interrogate as to previous declarations made by him inconsistent with his testimony, the object being to prove the witness' recollection and to lead him, if mistaken, to revise what he has said. 1 Wharton's Evidence, par. 549; 3 Rice's Evidence, par. 237.

But this proceeding is quite different from impeaching his credibility directly for the sole purpose of destroying, as claimed by the prosecution, his whole testimony. Generally, where proof is to be offered that a witness has said or done something inconsistent with his testimony, a foundation must be first laid and an opportunity for explanation offered by asking the witness whether he has not said or done what it is proposed to prove, specifying the particulars of time, place and person. 1 Greenleaf's Evidence, 463; 16 How. 38; 76 Penn. 83.

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The same course is pursued when allowed by statute with a witness, on his examination in chief, if the judge is of the opinion that he is hostile to the party by whom he was called. If the sole effect is to discredit the witness, apart from statutory regulations, such evidence is not admissible. But if the purpose be to show the witness in error it is admissible. *Bullard vs. Pearsall*, 53 N. Y. 230.

In the case just cited we think the law is correctly stated as follows: "This course of examination may result in satisfying the witness that he has fallen into error and that his original statements were correct, and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answer of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry. Proof by other witnesses that his statements are incorrect would have the same effect, yet the admissibility of such proof can not be questioned. It is only evidence offered for the purpose of impeaching the credibility of the witness, which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility."

The witness, W. A. Pearce, was a State witness, and on two occasions failed to state that his brother had handed him a pistol. On the second trial the fact as stated by him was disclosed on cross-examination by defendant's counsel. It was a statement unfavorable to the prosecution and we infer from the briefs material and important to the defendant in his plea of self-defence. The witness' testimony was inconsistent with his prior testimony, in which he suppressed, if the statement be true, an important and material fact. In reference to inconsistent statements, Mr. Rice, in his work on Evidence, Vol. 3, paragraph 236, says: "The party producing a witness is not allowed to impeach his credit by evidence of bad reputation, except when he is compelled to produce him by reason of the nature of the evidence sought, but he may contradict him by other evidence, and he may also ask him whether he has not made at other times, statements inconsistent with his present testimony. Under all rules of reason he is not allowed to contradict his witness upon any particular or material fact." This

has reference to the material fact as bearing on the credibility of the witness. The law is thus stated by Greenleaf: "You may cross-examine your own witness if he testify contrary to what you had a right to expect as to what he had stated in regard to the matter on former occasions, either in court or otherwise, and thus refresh the memory of the witness and give him full opportunity to set the matter right if he will; and, at all events, to set yourself right before the jury. But you can not do this for the mere purpose of discrediting the witness, nor can you be allowed to prove the contradictory statements of the witness upon other occasions, but must be restricted to proving the facts otherwise by other evidence."

And in the case of Coulter vs. American Merchants United Express Co., 56 N. Y. 585, it was held that a party may contradict his own witness as to a fact material to the case, although the effect of the proof may be to discredit him, but he can not impeach him, although subsequently called as a witness for the adverse party, either by general evidence, or by proof of contradictory statements out of court."

The witness was presented by the prosecution as worthy of credit, and he could not be impeached, either by general evidence or by proof of contradictory statements, in or out of court. He could have been contradicted as to a fact material to the case, although the effect of the proof may have discredited him, but the party calling him could not have adduced such contradiction when it is only material, as it bore upon his credibility. In the instant case the prosecution might have shown by other testimony that no pistol was handed to the witness by his brother, but he was not at liberty to prove that on a former trial the witness had omitted this fact from his testimony, as the fact of the omission went direct to the witness' credibility. The prosecution, although taken by surprise, so far as the witness was concerned, was limited to the interrogation heretofore alluded to, and the giving the witness the opportunity of explaining the inconsistency in his testimony.

The question was asked the witness Robert Pearce, sworn on behalf of the prosecution by the District Attorney, if he had not gone to Texas a short time prior to the last term of court, how much money he had, and from whom he obtained it. The question was allowed to be answered. Although the answer of the witness dissipated, to some extent at least, the effect which the question intend-

State vs. Vickers.

ed to produce, yet it was improper. Its sole purpose was to discredit the witness, as it was irrelevant and could have no effect.

For the reasons stated, in reviewing the questions asked the witness W. A. Pearce, this evidence was equally inadmissible.

The trial judge refused to permit certain threats of the Pearces to go to the jury. His reasons, appended to the bill, are sufficient to justify his ruling. He says: "The above statement of the evidence on the trial only purports to be a part of the testimony, and is, in fact, only a part of it, except the testimony of Robert Pearce, which was written down in full. The prisoner's testimony is quoted substantially right, except that he said that the gun might have fired accidentally, or something to that effect. W. A. Hick's testimony should be that W. A. Pearce replied to Vickers' denial, 'Well, if you did, I wanted to be ready, or wanted you to let me know, so that I could be ready,' or that he was ready, or words to that effect.

The evidence showed that the difficulty arose between Vickers and W. A. Pearce in the presence of Robert Pearce, and that his name was not mentioned, and that the alleged conspiracy between old man Pearce and Robert occurred after W. A. Pearce had left the house that morning, and that W. A. Pearce was unarmed and said nothing about it if it existed, and that the old man Pearce did not arrive on the scene until after all was over and the parties had scattered. Under these circumstances I did not see how the threats made by old man Pearce were admissible in justification of the shooting at W. A. Pearce, his son, when the old man was not present."

We need add nothing to this statement, as it shows that if any threats were made, they were the threats of old man Pearce, who was not engaged in the difficulty, and that if there was a conspiracy among them to take the life of Vickers no threats had been communicated to him. Even communicated threats will not justify an assault upon another unless the party making them attempts to carry them into execution by a hostile demonstration.

A motion for a new trial was filed and overruled. It embodies the matter reserved in the bills of exception, and further alleges that the judge had not charged the jury as to the legal effect of the accidental discharge of the prisoner's gun, and that one of the jurors who tried the case was disqualified, as he had formed and expressed an opinion as to the guilt of the defendant prior to the trial.

Succession of Mulledy.

As to the accidental discharge of the gun and its legal effect, no instructions were asked for on this point, although the written charge of the judge had been submitted to the attorneys of the defendant.

It is unnecessary to pass upon the question raised as to the qualification of the juror or the exception of the judge's refusal to give the special charge as to a reasonable doubt.

The judgment appealed from is annulled, avoided and reversed, and it is now ordered that this case be remanded to be proceeded with according to law.

No. 11,899.

SUCCESSION OF MICHAEL T. MULLEDY.

Congress appropriated five thousand dollars to the *heirs and legal representatives* of one of the victims of the Ford Theatre disaster.

It does not go to the administrator, as assets of his succession, and is not imputable to the payment of his debts.

The government having thought proper to make a grant of an amount to the heirs of one of the victims, *they* receive it as a gift, a bounty.

A PPEAL from the Civil District Court for the parish of Orleans.
Rightor, J.

Louque & Pomes for Opponent, and *James Timony* for Administrator, Appellees.

W. S. Benedict for Opponent, Appellant.

Argued and submitted November 23, 1895.

Opinion handed down December 2, 1895.

ON MOTION TO DISMISS.

The opinion of the court was delivered by

BREAU, J. The late Michael T. Mulledy, domiciled in New Orleans, was a victim of the Ford Theatre disaster in Washington.

Congress appropriated five thousand dollars to his heirs and legal representatives. His sister, Kate Mulledy, obtained letters of administration of the succession; an inventory was taken, upon which this amount, the only asset he left, was carried.

Succession of Mulledy.

In her account of administration she credits herself with one-half of the amount and her brother the other as the next of kin.

Maurice Hart, one of the creditors of the late Michael T. Mulledy, opposed the proposed distribution on the ground that the fund was the property of the deceased and liable to seizure for his debts.

This opposition was dismissed.

From the judgment of dismissal he appeals.

There was another opposition filed in the lower court by the heirs of a sister, deceased, of the late Michael T. Mulledy, claiming one-third of the amount to be distributed. They recovered judgment for the amount of one-third of the five thousand dollars.

Before this court the appellee moves to dismiss the appeal on the ground that the court is without jurisdiction *ratione materis*—the amount of appellant's claim being eight hundred and one dollars with interest.

The Constitution vests this court with jurisdiction of all cases in which the amount to be distributed exceeds two thousand dollars.

Ordinarily, the opposition will prevent a distribution of an amount sufficient to pay the judgment in case of judgment for the opponent, and no more need be withheld for the purpose.

Here the whole amount is involved. If opponent's claim be allowed it will necessarily change the title, the amount carried in the account of the administratrix will have to be settled as an asset of the succession and will not be subject to the claim of the next of kin in their own right.

It is manifest that the controversy involves the whole amount to be distributed and not merely the claim of the opponent.

Where an opposition affects the whole amount and gives good cause to withhold the distribution of amount exceeding two thousand dollars this court has jurisdiction.

ON THE MERITS.

The appellant urges that the fund having been inventoried as the property of the succession of Mulledy, and notice of the filing of her account as administratrix having been given to the creditors of his succession, she is as an heir concluded and can not claim the amount in her own right to the exclusion of the succession of her late brother, Michael T. Mulledy.

There was nothing in these proceedings which operated as a di-

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vestiture of title. In her account she and her co-heir claimed the property. Previously there was no abandonment of any right.

The donation was to the heirs and not to the succession of the deceased. It was an act of generosity over which the government had absolute control.

A similar question was decided in Emerson's Heirs vs. Hall, 14 La. 1. This court, on the ground that the ancestor had rendered meritorious services to the government, held that he held an equitable claim, and that the appropriation made was liable for the debts of the deceased.

This case was taken by writ of error to the Supreme Court of the United States, and the judgment of this court was reversed.

With great clearness it was said in that case: "Had Emerson become insolvent and made an assignment, would this claim, if it may be called a claim, have passed to his assignees? We think clearly it would not. Under such an assignment what could have passed? The claim is a nonentity. Neither in law or in equity has it any existence. * * * It is true remuneration can not be recovered against the government by action at law. A claim having no foundation in law, but depending entirely upon the generosity of the government, constitutes no basis for the action. It can not be assigned.

* * * * *

"In the present case the government might have directed the money to be paid to the creditors of Emerson, or to any part of his heirs. Being the donor, it could, in the exercise of its discretion, make such distribution or application of its bounty as circumstances might require."

Here, as in the case which we quote, the money was to be paid to the legal representative.

The interpretation given by the court of last resort to a statute of the United States, in a well reasoned case in reversing a decision of this court, is authoritative.

The judgment is therefore affirmed.

No. 11,863.

HERMAN ROEHL VS. T. C. PORTEOUS.

One of the obligors having promised the mortgagee that he would pay the amount of their indebtedness in the event of the sale of the property mortgaged, whatever the property would bring, he is not concluded so as to prevent him

47	1582
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47	1582
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from recovering one-half of the difference between the purchase price and the amount of the indebtedness, the proof being that, in promising to pay, he stipulated in good faith for the proceeds of the sale of the property to be credited on their indebtedness, and that after that credit he would pay the remainder of the obligation to the mortgagee.

Plaintiff having alleged that a sale had been made, and that half the difference was due him between the purchase price and the amount of the indebtedness of himself and his co-obligor (it being a joint venture), judgment must be suspended until proof is made of the price at which the land was sold. Although plaintiff is subrogated, he can not recover one-half of the difference (one-half balance of indebtedness) without establishing what that difference is, and he can not recover the entire claim on an allegation that one-half the difference of the price and the indebtedness is due him.

He having undertaken to give his co-obligor, *in solido*, credit for his interest in the land sold, it must be a credit based on a valid sale proved.

If the court were to pronounce judgment for the difference claimed it would have to assume that a legal sale was made as alleged.

The laws of a sister State must be proved as facts, and the foreclosure of a mortgage legal under the laws of the *situs* of the realty.

A PPEAL from the Civil District Court for the Parish of Orleans.
Monroe, J.

Buck, Walshe & Buck for Plaintiff, Appellant.

Omer Villeré for Defendant, Appellee.

Argued and submitted November 18, 1895.

Opinion handed down December 2, 1895.

The opinion of the court was delivered by

BREAUX, J. The plaintiff and the defendant bought land in Alabama from the Elyton Land Company, a corporation incorporated under the laws of the State of Alabama. The purchase price was ten thousand dollars; each paid one thousand dollars cash and gave notes for the credit portion. Two years and two months after this sale had been made, the capital and interest on the credit portion of the purchase price amounted to nine thousand three hundred dollars. The old notes were canceled and a deed was made to Porteous and Roehl by the company. The latter executed their notes for the amount due by them, payable in eight annual instalments, with semi-annual interest coupons. This amount Roehl, the plaintiff,

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claims to have paid, and this suit is brought by him against the defendant to recover from him the sum of three thousand one hundred and fifty-six dollars and twenty-two cents, with interest, being, he alleges, the defendant's share or a portion of a loss made by them "in a joint real estate speculation."

The plaintiff and defendant defaulted on some of these notes.

The deed in question signed by Porteous and Roehl was in the common law form, obligating themselves to pay the balance of the purchase price. The deed recites that in case of default as to any part of the price, the mortgagee would have the right to sue for the entire purchase price; after giving notice for thirty days by advertisement, of the time, place and terms of the sale, to sell the property at public outcry; execute title and apply the proceeds of the sale to the payment of the indebtedness and costs. The deed also recites:

"Such foreclosure, sale and conveyance may be made by the president or vice president of the Elyton Land Company or any person authorized by writing."

A bond executed by this company bears the date of this act of mortgage.

The recitals of the bond identify the mortgage and the notes as part of the sale and show that a sale was made of the property to the plaintiff and the defendant, "to have and to hold to the said T. O. Porteous and Herman Roehl."

The following is another of the declarations of the bond (the makers of the notes, plaintiff and defendant, were, under the laws of Alabama, jointly and severally bound):

"And the Elyton Land Company, for the consideration aforesaid, hereby covenants and agrees that it is seized of an indefeasible estate in fee simple in and to the premises aforesaid; that it has a good right to sell and convey the same; that the same are free from encumbrances, and that it will warrant the title."

The plaintiff, concerned about this indebtedness to the land company, called upon the defendant on the subject. The latter's advice was to let the property be sold, as under the laws of Alabama they would have two years after the sale within which to redeem.

An advice, it seems, that the plaintiff was not willing to follow.

The property was, plaintiff says, offered for sale. On the day of sale he was in Birmingham, Ala., and bid upon the property. It was

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on his bid, he alleges, adjudicated to him for six thousand dollars, and that he paid that amount and the remainder due by them on their notes. That the property was cried out and adjudicated to him by the vice president of the company, by whom alone the deed executed is signed.

This deed was admitted in evidence over the objections of the defendants.

During the trial several bills of exceptions were reserved.

The first bill shows that the counsel for defendant objected to the deed of mortgage of 17th day of January, 1889, upon the ground that "it purported to be a deed of sale of real estate" to the defendant, by whom it was not signed, and in consequence inadmissible. The second bill of exception was reserved to the court's action in admitting the deed of sale signed by the vice president of the land company, vendor, to the plaintiff, vendee.

The grounds are that it is not supported by the required formalities. Copies of the Alabama statutes, relating to contracts in writing assignable by endorsement, were admitted in evidence. They are evidence of the "effect of transfer on note given for the purchase money of lands and joint promises in writing, how construed." They relate exclusively to bills and notes.

Judgment was pronounced for the defendant, rejecting plaintiff's demand.

The plaintiff appeals.

Although the defendant mortgagor did not sign the deed of mortgage, having signed the notes secured by the mortgage, and obligated himself as one of the makers of the notes, with special reference to the mortgage by which they are secured as to their payment, he was without ground to urge that he was not a party to the mortgage.

In support of the second bill the defendant by counsel urges that in order to give effect to the last deed (the deed of sale to the plaintiff), it was necessary to prove that the alleged vice president of the company had authority to sign the deed and that it was necessary to show that a notice of demand and notice of seizure and sale were duly served upon the mortgagors, and that the sale was advertised as required.

The plain facts are that it is not shown that the property was advertised for sale and that any of the required notices were given;

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there is not of record any authentic evidence of the proceedings of foreclosure. It may be that some of the formalities of foreclosure are legal under the laws of Alabama, such as the offering of the property for sale by public auction by the vice president of the land company, the dispensing of all notices save the advertisement.

They are indispensable to a foreclosure of mortgage under the laws of this State. In the absence of all proof regarding the foreclosure of mortgages, it must be presumed that the laws of Alabama are similar in *pari materiz* to the laws of this State.

"The statutes of sister States are to be proved as facts, and no judicial notice can be taken of them, whether they be public or private." Sedgwick on the Interpretation of Laws, 2d Ed., p. 299.

Without legal proof of the laws in point of a common law State, it would be extremely difficult to hold under Louisiana laws that a common law mortgage has been duly foreclosed, in compliance with her laws.

The forms and conditions of the act are entirely different, and the steps to be followed in the foreclosure.

None the less, we must take notice of the fact under the evidence that plaintiff is the holder of the notes signed by him and the defendant as makers, and that the former is subrogated to the rights of the land company. At this point of the case there is very little difference, if any, between the plaintiff and the defendant, in so far as relates to the transfer of the land company's right. But the plaintiff urges that he acquired them for six thousand dollars, value of the property they bought in joint speculation, that he paid the remainder of their indebtedness in order to obtain his discharge and to hold the defendant for the amount of his indebtedness. The defendant, on the contrary, argues that the amount paid for the land in question was nine thousand three hundred dollars, and that he in consequence does not owe any difference, as there is none between the purchase price of the land and the amount of the indebtedness.

The facts as we interpret them do not sustain the defendant upon this point. The plaintiff is the only witness. His utterances as a witness, it may be, were not always clear. There was no attempt at evasion, and, taken as a whole, it is manifest that he did not buy the property in question for the balance due on the purchase price. He emphatically denied having made any such purchase. We do not discover that in his transaction with the Land Company he has con-

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cluded himself from claiming the difference between the purchase price and the total indebtedness, after a sale will have been shown, as alleged.

Although the fact is not shown with legal certainty, we are led to infer that the price was six thousand dollars, and not nine thousand three hundred dollars as it is urged by the defendant.

In the present condition of the case we do not think he can be charged with either amount. The venture was joint. They were to look to the proceeds of the sale. If the plaintiff has bought the property, it is subordinate to the original agreement that the venture should be joint. The obligation depends upon a future event, the sale of the land.

"It is not shown that any of the lands acquired by the parties under their agreement were ever sold." *Breaux vs. Lauve*, 24 An. 179, 181.

We the more readily adopt this view for the reason that it seems the property has been sold, and now it is only a question of settlement and payment of the difference between the price of the sale and the indebtedness (if a legal sale has been made).

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed.

It is further ordered, adjudged and decreed that the case be remanded to the District Court, to be tried in accordance with the views herein expressed.

That the costs be paid by the one finally cast in the suit.

No. 11,952.

THE STATE OF LOUISIANA VS. THOMAS HENRY AND GEORGE CORBES.

An information which charges the defendant with having robbed another of a designated sum of lawful money, the currency of the United States, charges a statutory offence within the intendment of the Revised Statutes, Sec. 810, and the consequence is, that it, being in the words of the statute, or those certain and equivalent having been employed, is valid and sufficient.

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A PPEAL from the Twenty-first Judicial District Court for the Parish of St. Charles. *Rost, J.*

M. J. Cunningham, Attorney General, and *Prentice E. Edrington*, District Attorney, for Plaintiff, Appellee.

State vs. Corbes.

Hiddleston Kenner for Thomas Henry, Defendant, Appellant.

Submitted on briefs November 23, 1895.

Opinion handed down December 2, 1895.

The opinion of the court was delivered by

WATKINS, J. The defendant, Thomas Henry, was found guilty of the crime of robbery, and from a sentence of three years at hard labor in the State penitentiary has appealed, relying upon a single bill of exception reserved to the ruling of the court overruling his motion in arrest of judgment.

His contention is, that robbery is not a crime which is defined in the criminal statutes of the State; and that, being a common law crime, the English common law must be resorted to for a definition of it. And that it is elementary that indictments for robbery must set out specifically all the essential elements of the crime of robbery at common law; and that the indictment against the accused is wholly inadequate and insufficient for that purpose. That to merely charge that the defendant has committed a robbery is not adequate or sufficient in law.

The grounds of defendant's motion are as follows, viz.:

"Now, under the common law, seven distinct ingredients are necessary and essential to constitute the crime of robbery, viz.:

"1. Ownership, or right of possession, of the property in the person alleged to have been robbed.

"2. That the property alleged to have been carried away must be personal property.

"3. That the property carried away must be certain.

"4. Force or fear must be used in taking away the property.

"5. The taking away must be against the will and without the consent of the possessor.

"6. That the thing stolen must be on the person or in the immediate presence of the possessor.

"7. that the taking away must be with an intent to steal." (Brief p. 2.)

Counsel's statement predicated upon these propositions is as follows, viz.:

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"It is hardly necessary to argue in support of this position. It is apparent that the ownership or right of possession must be in the party robbed, otherwise a person might be convicted of robbery if he took stolen property from a robber. It is also apparent that a person claiming property as his, and taking it from another, might be guilty of assault and battery but not of robbery.

"It must be personal property, because no one can steal a tract of land or a house. It must be described with certainty, because the accused is entitled to know this in order to make a defence. Force or fear is one of the most important and absolute essential ingredients of robbery, because it forms the distinction between this crime and larceny. The taking away must naturally be against the will of the owner. The thing stolen must be on the person or in the presence of the owner; this forms another important distinction between the crime of robbery and larceny. And, lastly, the taking away must be with the intent to steal, for it is plain that it is possible for a person to forcibly and against the will take something without any intent to steal. Thus a man in a quarrel might take a pistol or other weapon from his assailant, or seeing another about to destroy goods belonging to him, might interfere and take away the goods."

But we must look into the information and see what its averments are and whether they are amenable to the charges preferred against it.

They are as follows, viz.:

"That one Thomas Henry, and one George Corbes, * * * on or about the 13th day of July, 1895, with force and arms, in the parish aforesaid, then and there being, did unlawfully, wilfully, feloniously and violently seize, rob, take and carry away from the person of Allen McCoy, the sum of eight dollars and ninety cents, in money of the legal currency of the United States, contrary to the form of the statute of the State of Louisiana in such case made and provided," etc.

Our statute says:

"Whoever shall commit the crime of robbery, shall, on conviction," etc. Rev. Stat., Sec. 809.

But the next succeeding section is more comprehensive, for it says:

"The robbery or larceny of bank notes, obligations, or bills obligatory, or bills of exchange, promissory notes for the payment of

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any specific property, paper bills of credit, certificates granted by or under the authority of this State, or of the United States, or any of them, shall be punished in the same manner as the robbery of goods and chattels." Rev. Stat., Sec. 810.

The information charging defendant with the robbery of money, legal currency of the United States, the crime must be interpreted in the light of the latter section, the former having more direct applicability to "the robbery of goods and chattels."

Taken in this light, the crime charged must be considered rather as a statutory than a common law crime; and, the information tested, and its validity determined by the rules of construction applicable thereto, seems to be legal and sufficient.

This court has frequently held that indictments for offences created by statute should be charged in the words of the statute, or in words conveying the same meaning, and sufficiently definite as to bring the accused within its operation, so that he can not be misled as to the charge he is to answer. *State vs. Stiles*, 5 An. 324; *State vs. Benjamin*, 7 An. 47; *State vs. Murphy*, 43 Ark. 178.

In *State vs. Cason*, 20 An. 48, the defendant was charged with having stolen "lawful money of the United States" under Revised Statutes, Sec. 810, above quoted, and the court said:

"The defendant is accused of a statutory offence; in such case the indictment should describe the crime in the words of the statute, or in words certain and equivalent, going to show that the offence has been committed, and is punishable under the law."

The court then added:

"No such effects or notes as 'greenbacks' are known in law; but treasury notes of the United States are recognized by the laws of Congress."

The information brings the crime of robbery that it charges against the defendant, Henry, strictly within the statute and that decision.

In *State vs. Carro*, 26 An. 377, the court held to be sufficient, an indictment which charged that defendant "did feloniously and violently seize, take and carry away the sum of one hundred dollars in paper currency of the United States of America."

The court said that it was "a substantial compliance with the statute." Rev. Stat., Sec. 1061.

And that statute declares that "in every indictment in which it

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shall be necessary to make an averment as to any money or any bank note, it shall be sufficient to describe such money or bank note as money without specifying any particular coin or bank note," etc. Rev. Stat., Sec. 1061.

In *State vs. Schonhausen*, 26 An. 421, the court said:

"The charge of the indictment is the felonious and violent taking of the sum of seventeen hundred and forty-four dollars in paper money of the United States of America. This comes within the law. Rev. Stat., Sec. 810." *State vs. Robinson*, 29 An. 364.

The information affirms that the defendant, Henry, did take and carry away from the person of Allen McCoy the sum of eight dollars and ninety cents;" that certainly charges McCoy's rightful possession of the money and answers defendant's *first* objection as to possession.

It also answers his *second* objection with regard to the property having been personal. It also answers the *third* objection as to the property carried away being certain.

The information affirms that the defendant "did unlawfully, wilfully, feloniously and violently seize, rob, take and carry away from the person of Allen McCoy," etc., and Wharton says that "while there must be a felonious taking of property from the presence of another, either by actual or by constructive force * * * yet, if force be used, fear is not an essential ingredient." *Whar. Crim. Law*, Sec. 850.

This is a complete answer to defendant's fourth objection.

That author further says:

"As a rule, robbery must be against the will; at the same time, as in the parallel case of rape, against the will, if there be force, is to be treated as convertible with 'without consent,' " etc. *Ibid.*, Sec. 855.

That is an answer to defendant's *fifth* objection.

The indictment charges that defendant "did seize, rob, take and carry away from the person," etc., and this answers defendant's *sixth* objection.

With regard to the intent, the information charges that the defendant did "unlawfully, wilfully, feloniously and violently seize, rob, take and carry away," etc.; and Wharton says, that "the goods, also, must appear to have been taken *animo furandi*, as in cases of larceny, though this is to be judged of from circumstances." *Ibid.*, Sec. 848.

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This answers defendant's *seventh* and last objection.

A careful scrutiny of the information and a comparison of it with the law has satisfied us that the defendant's objections are not well founded.

Judgment affirmed.

No. 11,913.

STATE OF LOUISIANA EX REL R. F. HOGSETT, SR., vs. J. H. PATIN, JUSTICE OF THE PEACE.

A justice of the peace who is, by a party litigant in his court, recused on the charge of having a personal and pecuniary interest in the suit, is incompetent to make any order except one of recusation, and assignment to some other justice of the peace in the vicinage, having concurrent jurisdiction.

APPPLICATION for a Writ of Prohibition.

Foster & Broussard for Relator.

William John McCall for Respondent.

Submitted on briefs November 9, 1895.

Opinion handed down December 2, 1895.

APPLICATION FOR A WRIT OF PROHIBITION.

The opinion of the court was delivered by

WATKINS, J. Relator, as defendant in the suit of J. E. McDonald against him in the court of the respondent, complains that he tendered a plea of recusation of the respondent in writing, *in limine*, and prayed that he enter an order recusing himself, and referring the aforesaid plea, for trial and determination, to some justice or judge of concurrent jurisdiction; but that, on the contrary, the respondent at once illegally and wrongfully passed upon and decided said motion and illegally overruled it, refused to make the reference to another judge of concurrent jurisdiction, and refused to recuse himself.

Relator shows that under the law the respondent had no legal right to pass upon and decide the grounds of recusation stated in said motion, but was compelled to grant the order prayed for and

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refer said motion for trial to the nearest justice of the peace having jurisdiction.

Relator shows that the four suits which have been brought against him are for *one dollar each*, and that the suits have been filed in this manner for the sole purpose of making unnecessary costs.

That he has no right of appeal, and that he apprehends that the illegal acts of the respondent taking unwarranted jurisdiction in those cases will cause him irreparable injury. That in refusing to grant his motion to assign the question of his recusation to another judge or justice of concurrent jurisdiction, for trial, and assuming jurisdiction, and proceeding to the trial of said four causes, the respondent exceeded the bounds of his jurisdiction and authority.

That he is entitled to a writ of prohibition to prevent his further proceedings in said suits.

The respondent returns, that he has jurisdiction of the question in dispute, and that the averment of the relator's petition to the effect, that "he is in any manner interested, financially or otherwise, in the result of said causes is absolutely false and unfounded in fact."

He further returns that the motion to recuse him was, upon its face, frivolous, and was intended to procure delay.

The record of those suits discloses that relator's motion to recuse the respondent, avers that he has an interest, personal and official, in the matter herein involved, and that that interest is connected with the interest of plaintiff, in that he has an understanding and agreement with the plaintiff, or promise from him to receive from him a certain percentage on the amount of plaintiff's claim sued on and collected."

And it further alleges that respondent "has been consulted and advised with by the plaintiff regarding this claim," etc.

It further shows that this motion was filed in the respondent's court on the 18th of October, 1895, and on the 23d of same month and year that the respondent gave to the attorneys of relator the following notice, viz.:

"JOHN E. McDONALD	}	Nos. 335, 336, 337, 338.
vs.		
"R. F. HOGSETT.		

"To R. F. Hogsett, Sr., Greeting (T. D. Foster and R. F. Broussard, Attorneys):

"Take notice that in the above entitled and numbered causes, that the motion filed by you has been overruled, for the reason that

State ex rel. Hogsett, Sr., vs. Justice.

the averments therein contained have no existence in fact or form, nor do they contain any element of truth in their construction.

“Given under my hand officially this the 28d day of October, 1895.

“J. H. PATIN, J. P.”

Liberalley construed, respondent's representations are, that the charges are untrue in point of fact, and that is the purport of his return.

Accepting this statement of the respondent, as true in fact, does that put the matter in any more favorable light?

The motion does charge, in express terms, that the respondent had and has a personal interest in the claims in suit in the cases before his court. That that interest is connected with that of the plaintiff. That there exists an understanding and agreement between the respondent and the plaintiff therein, to the effect that the former is to receive a percentage of the claims in the event of their collection.

These charges are plain, direct and unequivocal. If true, certainly the respondent ought not to sit in judgment on those cases.

In our opinion he ought not to have attempted to have thus summarily brushed the charges aside and proceeded with their trial.

From the notice given to relator's counsel it appears that he not only *tried* the application to recuse him as judge and dismissed it, but that he evidently proceeded very summarily in the premises, acted without any evidence and *ex parte*.

The law provides that a judge may be recused by reason of “his being interested in the cause and for other just causes,” etc. C. P. 337, 338.

And the Code instances the case of “his having been employed or consulted as advocate in the case.” *Id.* No. 2.

It further declares that “when the judge is personally interested in the suit,” he shall call on some other judge “to try the case.” C. P. 342.

It further expressly provides with regard to justices of the peace that in case he be challenged for any cause “he shall send the cause to be tried by the justice of the peace living nearest to the domicile or usual place of residence of the defendant.” C. P. 1072.

A judge can not determine a plea of recusation, however unfounded it may be.

In *State ex rel. Segura vs. Judge*, 37 An. 253, this court said:

"The complaint is that after the plea of recusation was filed, the judge refused to refer the trial thereof to another judge acting in his place; that he passed upon and overruled it; that he ought not to have tried the same, and that he is incompetent to sit on the merits of the case."

The court then very correctly observes that "it may well be, as respondent claims, that the relator has no just foundation to recuse him and that the plea has no merit; but if such indeed be the case, it is not for him to say so.

"His duty was on the filing of the recusation to have recused himself, to have called in another judge to try the plea, and eventually the case, and to have abstained from exercising jurisdiction over the matter pertaining to the case until the plea had been effectually overruled."

In *Hunter vs. Blackman*, Manning's Unreported Cases, 427, our immediate predecessors said "that a recused judge is incompetent to make any order except one of recusation." See, also, to the same effect, *State ex rel. Tyrrell vs. Judge*, 38 An. 1293; *State ex rel. President, etc., vs. Bishop*, 36 An. 160; *State ex rel. Trimble vs. Judge*, 38 An. 247; *State ex rel. Nolan vs. Judge*, 39 An. 995; *State ex rel. Fontelieu vs. Judge*, 37 An. 394.

Counsel for the respondent refers us to the case of *State ex rel. Mexican International Improvement Company*, 41 An. 567, as announcing a different principle; but it presents a wholly different question. For it appears that the presiding judge, *ex proprio motu*, recused himself on the ground of relationship and the cause was at once reallocated to another judge.

He also refers to the case of *State vs. Chantlain*, 42 An. 719, but that decision, whilst quoting with approval the principles governing the 38 An. 1293, 37 An. 253, 38 An. 247, 39 An. 995, proceeds thus:

"But these decisions do not refer to motions which upon their face, and admitting all their allegations to be true, afford no legal ground for recusation."

After referring to the provisions of the Code of Practice applicable, the court say:

"The motion made by the defendant sets forth no one of these causes. It was frivolous on its face, made on the eve of trial, and could have no purpose or effect but to create delay."

State vs. Lundie and Riggs.

No such state of facts exists in this case. The relator is entitled to relief.

It is therefore ordered that the preliminary writ of prohibition be perpetuated and made absolute and peremptory, at respondent's cost.

No. 11,892.

STATE OF LOUISIANA VS. FRANK LUNDIE AND FRANK RIGGS.

The legality of a tax is contested when it is alleged that there is no law under which the license or tax can be imposed.

Evidence admitted without objection cured the vagueness and insufficiency of the answer.

Shows and exhibitions, free of any charge or contribution of any kind, do not owe licenses.

The outside free shows, such as "Punch and Judy," "Balloon Ascensions" and "Processions," to attract the crowd to the performance, where an entrance fee is charged, are included within the license of the latter.

A PPEAL from the Third Justice's Court for the Parish of St. Tammany. *Jack Strain, J.*

M. J. Cunningham, Attorney General, and *Clay Elliott* for Plaintiffs, Appellees.

George E. Williams for Defendants, Appellants.

Submitted on briefs November 18, 1895.

Opinion handed down December 2, 1895.

The opinion of the court was delivered by

BREAUX, J. The defendants were sued to compel them to pay a license of fifty dollars for carrying on and conducting a "Punch and Judy" and "Magic Lantern" show and performance.

From a judgment condemning each defendant to pay a license of thirty dollars, they appeal.

The record presents the question whether the tax collecting authorities can collect a license from shows and exhibitions given free of charge. The answer of the defendant is a general denial, and they specially "deny the legality of the tax, and they aver that there is no law which requires them to pay a license in this State."

State vs. Thompson.

To this, objection is urged by plaintiffs on the grounds:

1. That the pleadings are too loose and general to serve as a basis of defence.

2. That the allegations denying that there is a law which requires them to pay a license to the State is a special defence to which the defendants' case must be confined.

Evidence admitted without objection proves that they did not charge any admission fee and thereby this evidence supplies the insufficiency of allegation of the answer. In consequence under the plea of the illegality of the demand, the issue is properly before us for decision, whether considered under the plea of general denial or under the special defence that there is no law requiring them to pay a license.

The legality is contested when it is claimed there is no law authorizing the tax, or that the statute authorizing it is invalid, or that it has been imposed in violation of a valid law. *Gillis vs. Clayton*, 33 An. 285; *Adler, Goldman & Co. vs. Board of Assessors*, 37 An. 507, 508.

It being a fact shown without objection, that they do not charge or receive contributions; they can not be held for a license. There must be some feature of business about the performance in order that the State may be entitled to a license.

As the case comes to us there is absolutely no charge of any kind made and no contribution solicited or expected.

Other shows and performances it seems, draw the crowd by means of free shows. The law does not, as we read, contemplate that the free exhibition also should pay a license.

It is therefore ordered adjudged and decreed, that the judgment appealed from be avoided, annulled and reversed, and that plaintiff's demand be rejected.

No. 11,895.

STATE OF LOUISIANA VS. HENRY THOMPSON.

The court again affirms that juries may convict on the testimony not corroborated of the accomplice if they believe his testimony. 1 *Greenleaf*, Secs. 372-379; 1 *Archbold*, p. 502; 25 An. 522; 33 An. 158; Constitution, Art. 168.

The decisions in the Callahan and Dudoussat cases do not trench on previous decisions in reference to accomplices. One of these decisions holds that if corroboration of the accomplice is attempted, it must be by that species of confirmatory testimony the law exacts in such cases; the other holds that this

State vs. Thompson.

court will not set aside a verdict on the ground that illegal testimony was admitted to sustain that of the accomplice when it was an issue of fact with which this court can not deal, whether or not the witness was a feigned accomplice or an accomplice at all. 47 An., pp. 444, 997; Constitution, Art. 81, limiting the jurisdiction of this court in criminal cases.

A PPEAL from the Third Judicial District Court for the Parish of Claiborne. *Barksdale, J.*

M. J. Cunningham, Attorney General, and *James D. Everett*, District Attorney, for Plaintiff, Appellee.

E. H. McClendon for Defendant, Appellant.

Submitted on briefs November 9, 1895.

Opinion handed down December 2, 1895.

The opinion of the court was delivered by

MILLER, J. From a sentence for arson defendant appeals.

The judge refused to instruct the jury that the defendant could not be convicted on the testimony alone of an accomplice not corroborated, and this refusal is the subject of the bills of exceptions.

The *particeps criminis* is not on that account an incompetent witness. Competency exists until conviction and sentence. Hence, it is settled that the accomplice may be used as a witness by the State. In this case the defendant alone was indicted, and even when the participant is jointly indicted with the other, the prosecution as to the accomplice may be withdrawn to use him as a witness. 1 Greenleaf, Secs. 372, 379; 1 Archbold, 502; *State vs. Prudhomme*, 25 An. 522; *State vs. Russell*, 33 An. 185. The testimony of the accomplice being admissible, it has been held by the courts of other States, and in Louisiana, that the conviction could be had on the testimony alone of the accomplice, without corroboration, if the jury believed his testimony. This conclusion was reached by our courts more readily, perhaps, because our law makes the jury judges of the facts. Const., Art. 168; R. S. S. 991.

It is claimed in argument here, that our courts have gone too far in holding that juries may convict on the unaided testimony of an

State vs Thompson.

accomplice. While the text writers recognize the infirmity of that species of testimony and commend the caution which judges have enjoined on juries with reference to such testimony, still it is the current of authority that the jury may act on the testimony of the accomplice only, and convict. 1 Greenleaf, Sec. 380; 1 Archbold, p. 502; Wharton's Criminal Evidence, Sec. 441. With us the charge of the judge is restricted to giving the jury the law applicable to the case, leaving to them the determination of the weight due to the testimony. The direction given by judges in other States not to convict on the testimony of an accomplice would be to trench on the functions of the jury here. Constitution, Art. 168; R. S., Sec. 991. We think, therefore, that the decisions of our courts on this subject have very respectable support in the text-books and jurisprudence of other States, and are in harmony with our Constitution and laws.

It is urged on us that the decisions in the Callahan and Dudoussat cases, 47 An. 444 and 997 respectively, are in conflict with previous decisions. Neither of those decisions exhibit any such conflict. The question, in the first case, so far as connected with the present contention, was not whether corroboration of an accomplice was requisite, but the character of confirmatory testimony if attempted to be offered. The court held that the supposed testimony, tendered as corroboration, was illegal, and on that ground set aside the verdict. In the Dudoussat case it was held that the testimony admissible to confirm the ordinary witness could not be deemed illegal on the assumption it was to support an accomplice, when the issue of fact before the jury was whether the witness was a feigned accomplice or an accomplice at all, an issue with which this court could not deal. Neither decision expressed or implied that the accomplice must be corroborated.

Our jurisprudence on this subject, we think, must be deemed settled, and sustains the refusal to charge as requested, and that given. State vs. Prudhomme, 25 An. 522; State vs. Russell, 38 An. 135.

It is therefore ordered, adjudged and decreed that the sentence of the lower court be affirmed, with costs.

BREAUX, J., concurs in the decree.

 State ex rel. Romero vs. Judge.

 47 1600
 112 1098

 47 1600
 116 368

 47 1600
 120 377

No. 11,894.

STATE OF LOUISIANA EX REL. LOUIS ROMERO VS. HON. A. C.
 ALLEN, JUDGE OF THE SEVENTEENTH JUDICIAL DISTRICT
 COURT, PARISH OF VERMILION.

The court again affirms that applications for writs of prohibition and *certiorari* under Art. 90 of the Constitution will not be entertained, unless the appropriate method to obtain relief is first resorted to in the lower court.

APPPLICATION for Writs of *Certiorari*, Prohibition and *Habeas Corpus*.

L. L. Bourges for Relator.

Submitted on briefs November 4, 1895.

Opinion handed down November 18, 1895.

Rehearing refused December 17, 1895.

APPLICATION FOR WRITS OF CERTIORARI AND PROHIBITION.

The opinion of the court was delivered by

MILLER, J. The relator, sentenced by the lower court to pay a fine for refusing to work on the public roads, or be imprisoned for thirty days, complains that the sentence is in excess of the jurisdiction of the court; that he has no remedy by appeal, and asks relief at our hands by the issue of writs of prohibition and *certiorari*.

The proceedings against the relator, resulting in the sentence, were under the act of the Legislature No. 112 of 1880, amending the section of the Revised Statutes relative to public roads. The act provides that for the failure to work on the roads when required, as prescribed in the act, the penalty incurred shall be a fine, and in default of payment, imprisonment not exceeding five days. The sentence was undoubtedly, in excess of the power of the court to impose, but the judge, in his return, states the sentence as pronounced was in accordance with the law, but was erroneously entered on the minutes. Of course, we are restricted to the record in our examination of the case. However, the record shows no attempt in the lower court to correct the error in the sentence. If the excess of the punishment over that allowed by the statute had of been brought to the notice of the court, we can not doubt the error would

State ex rel. Paving Co. vs. Judges.

have been corrected. We think this a proper case to apply the rule that on these applications the relief will be refused unless the opportunity is afforded the lower court to correct the error, the basis of complaint. In this case we are bound to presume an application to correct the minutes so as to show the proper sentence would have accomplished the object of the application to us. The *State ex rel. J. L. Smith vs. The Judge of the Eighteenth District Court, parish of St. Tammany*, 38 An. 920; *State ex rel. J. A. Shakespeare, Mayor, vs. Judge Civil District Court, Division "E,"* 40 An. 607.

It is therefore ordered, adjudged and decreed that the relator's petition be dismissed at his costs.

No. 11,882.

47 1601
49 56

THE STATE OF LOUISIANA EX REL. ROSETTA GRAVEL PAVING AND IMPROVEMENT COMPANY VS. THE JUDGES OF THE CIVIL DISTRICT COURT OF THE PARISH OF ORLEANS.

When several suits, identical in every respect, are filed for the purpose of obtaining the allotment of one to a certain Division of the Civil District Court, Parish of Orleans, the first assignment of one will carry the others to the same Division, as there is but one case in fact and in law.

APPPLICATION for Writs of *Mandamus* and Prohibition.

Branch K. Miller for Relator.

Submitted on briefs November 9, 1895.

Opinion handed down November 18, 1895.

Rehearing refused December 16, 1895.

ON APPLICATION FOR WRITS OF MANDAMUS AND PROHIBITION.

The opinion of the court was delivered by

MCENERY, J. The relator filed in the Civil District Court, parish of Orleans, five suits against the New Orleans Traction Company, Limited, for the sum of one hundred and twenty thousand two hundred and thirty-five dollars and thirteen cents, each of said suits being based on the identical cause of action, and each but a duplicate of the other. The object and purpose, as the relator declares,

State ex rel. Shaw vs. Judge.

in filing these suits was to obtain the chance of having his cause allotted to a division of said court, then open and transacting business. If one of the cases had been allotted to this division it was relator's intention to discontinue the other cases.

The presiding judge of the division ordered the clerk to make one allotment of the five cases, and that to the division of the court to which the first of the cases was assigned.

The relator now proceeds by way of *mandamus* to compel an assignment or allotment among the judges of the Civil District Court of the other four cases filed by the relator.

The answer of the respondent judge gives his reasons for the order issued by him. They are conclusive and admit of no controversy.

It is not necessary to say what was the intention of the framers of the Constitution in enacting Article 130. It is enough to say that it provides that cases filed in the Civil District Court shall be equally allotted and assigned among the judges of said courts in accordance with rules of court to be adopted for that purpose.

There was, in fact, but one cause of action filed by the relator, and when it was assigned, under the rules of the court, this finally determined to what division it should go for trial. The other suits, duplicates of the one assigned, necessarily followed the one assigned, as they were identical with it.

The proceedings adopted by relator would be the means, if permitted, to defeat the intent of the article of the Constitution for an equal distribution of cases, for there would be the same case, the identical cause of action, the same plaintiff and defendant, before each division of the court.

The relief prayed for is denied and the rule granted herein discharged at relator's costs.

No. 11,881.

STATE OF LOUISIANA EX REL. JOHN T. SHAW vs. HON. T. C. W. ELLIS, JUDGE OF THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, DIVISION "A."

The allegation in the petition of a relator praying for relief through a writ of prohibition, that he has no remedy in the premises otherwise than through the special relief asked, is a mere conclusion of law, carrying with it no force, in the absence of a statement of facts going to show the correctness of that conclusion.

Prohibition is not a proper remedy where relief can be reached through appeal or injunction.

47 1602
48 1350

47 1602
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47 1602
52 258

State ex rel. Shaw vs. Judge.

APPPLICATION for a Writ of Prohibition.

Dinkelspiel & Hart for Relator.

Felix J. Dreyfous and *Solomon Wolff* for Respondent.

Submitted on briefs November 4, 1895.

Opinion handed down November 18, 1895.

Rehearing refused December 16, 1895.

On July 18, 1895, a petition and notice of demand were served on relator in the case of *George Montgomery vs. John T. Shaw*, No. 46,475, Division "A," of the docket of the Civil District Court for the parish of Orleans, being a proceeding by executory process. Upon said petition was endorsed an order for executory process, and was signed by T. C. W. Ellis, Judge of the Civil District Court for the parish of Orleans, presiding in Division "A."

It is contended that said order was improvidently and improperly signed by said judge, for the reason that on July 3, 1895, he had adjourned his court without day, and departed from the parish of Orleans, and was only temporarily in the parish on July 18, 1895, when said order was signed by him. That said order was not signed at the court house, and was signed by the said judge while he was temporarily in the city of New Orleans, and not in the city for the purpose of holding court or exercising judicial functions.

The judge of Division "A" made return that on July 5, 1895, he adjourned Division "A" of the Civil District Court *sine die*. That under the act of 1892, regulating the terms of said court, Divisions "B" and "C" remained open, the judge of Division "C" to act for Division "A;" that he left the city of New Orleans and returned on a visit, and not for duty, on July 18, and did not reopen Division "A" until September, when he began his vacation term, serving until October 20. That on July 18, the clerk's deputy brought him a petition for executory process in *Montgomery vs. Shaw*, with the statement that the judge of Division "C," doubting his power, had refused to sign the order after the allotment of the case to Division

Pickett et al. vs. Athletic Club.

The opinion of the court was delivered by

BREAUX, J. The plaintiffs, heirs of the late W. S. Pickett, who died on the 4th day of August, 1884, sue for the recovery of a square of ground purchased by their ancestor in the year 1856. It was sold for taxes in 1883 and adjudicated to the State of Louisiana. Prior to that time, to-wit: in 1876, under revenue act of 1873, it had been adjudicated to the State in payment of taxes for 1867 to 1876.

With reference to the sale, made in 1883, it is urged that no notice had been given to the owner.

With reference to the tax deed of 1876, it is argued that as there is no recital in the tax collector's deed and no evidence *aliunde* of the appointment of a curator *ad hoc* to represent the absent owner and no evidence of notice to him.

Under Sec. 8 of an act approved July 12, 1888, the auditor sold the property to John Spansell, who subsequently became defendant's author.

The tax collector declares in his deed showing the adjudication of the property to the State for the taxes of 1880 and subsequent years, that legal notice of sale was given to Wm. M. Pickett, the tax debtor.

The chief deputy clerk for the State Tax Collector, by whom the adjudication was made to the State in 1883, testifies substantially, that the notices to the tax debtors were mailed to the owners where the property was located, when their residences were not known. There is also evidence of record to show that the late Wm. M. Pickett had not resided in New Orleans (in which the property is situated) since 1865.

The defendant urges good faith, pleads the validity of the tax proceedings and invokes the prescription of one, five and ten years.

From a judgment rejecting their demand the plaintiffs appeal.

The main attack upon the last deed of adjudication to the State is the asserted want of notice of sale to the taxpayer as required by Art. 210 of the Constitution.

The deeds of tax collectors for those years are *prima facie* evidence of legal sales. Unless that presumption be controverted, and the contrary of the recital of the deeds is established, it should be accepted as true.

The recital is true until its untruth is established.

Pickett et al vs. Athletic Club.

The decisions heretofore were controlled by the fact that it was made manifest that no notice, as required, had been given of taxes due for which it was the intention to offer the property for sale.

In the case of *Breaux vs. Negrotto*, 43 An. 426-483, this court said: "But we think the evidence is conclusive that no notice of any kind was ever served on the plaintiff."

In *Parish of Concordia vs. Bertron*, 46 An. 356-360: "It is in proof, no notice was given in the parish of that adjudication as required by the Constitution."

Here there is no evidence of witnesses on the trial of a positive character regarding notice, and impeaching the veracity of the declarations of the deed.

In the absence of such evidence we do not feel authorized to treat as naught these declarations, made at a time contemporaneous with the proceedings of sale.

The following we must regard as controlling considerations in reaching a conclusion upon this point.

Plaintiff in a petitory suit for property sold at tax sale (after the many years that have elapsed in this case) must make out his title to the property on all points.

The proceedings being regular, on the face of the papers, the evidence must be of a positive and convincing character to authorize the courts to set aside and declare null a tax deed upon the ground urged. The property had been assessed, duly advertised, offered for sale and adjudicated, and presumably the notice required preceding the sale was given.

The action of plaintiff is met by another tax deed, anterior in date, made under the provisions of Act 47 of 1873. Plaintiffs urge its nullity on a number of grounds—that the taxpayer was absent and no curator *ad hoc* was appointed to represent him; that the purchase for the State was subject to the approval of the auditor, and without that approval there was no sale.

Near twenty years have elapsed since this sale was made. The tax debtor remained silent; at his death the plaintiffs did not choose to assert title or interest in the property; they are confronted with great difficulties to have it now determined that at the date of the sale the property was vacant, or that the owner was unknown or absent, or had left no known agent in this State, conditions required for the appointment of a curator *ad hoc*.

Pickett et al. vs. Athletic Club.

The sale was *prima facie* valid under the terms of the Constitution. The presumption sustains the claim of the State as a purchaser in good faith and the title of the defendant also finds support in the adjudication to the State which remained so many years unquestioned.

The least effect that this state of fact can have is to impose upon the plaintiff the burden of proving all the conditions essential to establish the taxpayer's absence.

Without the absence the title was legal and in due form and all needful notices were served, it must be conceded.

The absence that would annul should be timely invoked and amply shown.

Time obliterates evidence and removes from the parties the means to verify transactions, hence it creates a presumption in favor of the regularity of proceedings and against the charge of illegality.

Lastly, the plaintiffs' objection is that the auditor did not confirm the sale to the State.

Section 62 of Act 42 of 1871 and Sec. 6 of Act 47 of 1873 are similar. Interpreting the former, this court held that the omission to obtain the auditor's deed did not invalidate the tax collector's deed as a muniment of title. The correctness of the decision upon this point has since always remained unquestioned. *Barrow vs. Wilson*, 39 An. 407.

If we should concede that the tax sale in 1876 is void, and that plaintiffs in law can not be held to the proof we have before stated, they are then confronted with the tax deed of 1883, in which it is declared that all required notices have been given.

The testimony of a clerk in the tax collector's office, general in its character, does not show want of notice.

In the case of *Webre vs. Moore*, 45 An. 574-579, we said: "But we wish to say that it is based upon and confined to the particular facts fully stated in the opinion, and is not intended to give a license to tax collectors to dispense with notice to absent owners whose names are known, but whose residence is unknown, without exhausting the means provided by law for obtaining the latter."

It must be held, until the contrary appears, that the collector exhausted the means provided by law, as stated in the deed.

Judgment affirmed.

No. 11,916.

THE STATE OF LOUISIANA VS. MUFF WILLIAMS.

There is no law in this State requiring the service of a copy upon an accused of a *proces verbal* of the action of the jury commissioners in drawing the jury. Rev. Stat., Sec. 992.

The endorsement on an indictment "a *thru* bill," evidently intended for "a *true* bill," will be considered as so intended by the grand jury and to have resulted either from a slip of the pen or mistake by the foreman, whose mother tongue was probably not English, as to the spelling of the word, or as to the word itself.

The objection raised by the accused to the finding of the grand jury went only to form, and not to the *charge* presented against him. Under Sec. 1064, Rev Stat., an amendment was properly ordered by the court.

A PPEAL from the Twentieth Judicial District Court for the Parish of Assumption. *Guion, J.*

M. J. Cunningham, Attorney General, *O. D. Billion*, District Attorney (John Marks, of Counsel), for Plaintiff, Appellee.

Lawrence H. Pugh for Defendant, Appellant.

Submitted on briefs November 23, 1895.

Opinion handed down December 2, 1895.

The opinion of the court was delivered by

NICHOLLS, C. J. Defendant has appealed from a sentence of death, based upon the verdict of a jury rendered upon an indictment charging him with murder.

One of his grounds of complaint is that he was not served with a copy of *venire* as the law requires, because of the failure of the paper served on him to contain a copy of the "*proces verbal* of the jury commissioners showing the date of drawing and number of jury commissioners present."

We know of no law requiring the service of a copy of a *proces verbal* upon an accused person of the action of the jury commissioners in drawing the jury.

Section 992 of the Revised Statutes declares simply that "every person who shall be indicted for any capital crime, or any crime

State vs. Williams.

punishable with imprisonment at hard labor for seven years or upward, shall have a copy of the indictment and the list of the jury, which are to pass on his trial, delivered to him at least two whole days before the trial."

The other grounds of complaint, though raised at different times and in different forms, all rest upon the correctness or incorrectness of the proposition advanced by him that no *true bill* had been found against him by the grand jury. He contends that "the finding of the grand jury was incomplete, insensible, utterly void, null and meaningless, and the so-called indictment fatally defective by reason of the said finding."

From the motions to quash, demurrer, bills of exception, motions for a new trial and motion in arrest of judgment, it would appear that the finding of the grand jury, endorsed on the back of the indictment and signed by the foreman, was written "*a thru bill*," instead of "*a true bill*."

The objection to the finding of the grand jury was first raised by demurrer and motion to quash before trial, but after arraignment. The court overruled the objection, holding that the finding and endorsement were sufficient under the rule of *idem sonans*, but none the less it ordered the clerk of court to enter an order directing the finding by the grand jury on the indictment to be so amended as to read, "*a true bill*." The copy of the indictment served upon the defendant was a copy of the indictment as so amended.

In the proceedings of the court of September 18, 1894, we find the following minute entry:

STATE OF LOUISIANA	} No. 911.
<i>versus</i>	
MUFF WILLIAMS,	
Indictment for Murder.	

In this case the grand jury came into open court and reported the following, viz.: "Indictment for murder; a true bill.

(Signed) "L. HIMEL, Foreman of the Grand Jury."

We assume that the original entry (prior to amendment) was: "Indictment for murder; a thru bill.

(Signed) "L. HIMEL, Foreman of the Grand Jury."

In the first volume of Wharton on Criminal Law (Principles, Pleading and Evidence), Sec. 497, the author discusses the subject

of the "Finding and attesting of the bill." He says: "The examination being over, it becomes the duty of the grand jury to pass upon the bill * * * The usual practice is for the foreman to sign the return, and the words 'a true bill,' with his name attached, have been frequently considered a good finding, though it was held not an error where the endorsement was simply 'a bill,' omitting the word 'true.' And in some States it has been held sufficient to omit the words 'a true bill' altogether, where the signature of the foreman is given. The weight of authority, however, is that the omission of the words 'true bill,' if excepted to before verdict, will be fatal."

In *Frisbie vs. United States*, 157 U. S. 163, the Supreme Court of the United States said:

"It is objected that the indictment lacks the endorsement 'a true bill,' as well as the signature of the foreman of the grand jury. No objection was made on this ground in the Circuit Court, either before or after the trial. There is in the Federal Statutes no mandatory provision requiring such endorsement or authentication, and the matter must therefore be determined on general principles.

"It may be conceded that in the mother country, formerly at least, such endorsement and authentication were essential.

"The endorsement is parcel of the indictment and the perfection of it. (*King vs. Ford*, Yelv. 99.) But this grew out of the practice there obtained.

"The bills of indictment or formal accusations of crime were prepared and presented to the grand jury, who, after investigation, either approved or disapproved of the accusation, and indicated their action by the endorsement 'a true bill' or 'ignoramus,' or sometimes in lieu of the latter 'not found,' and all the bills thus acted upon were returned by the grand jury to the court. In this way the endorsement became the evidence, if not the only evidence, to the court, of their actions.

"But in this country the common practice is for the grand jury to investigate any alleged crime, no matter how, or by whom, suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment. Thus, they return into court only those accusations which they have approved, and the fact

State vs. Williams.

that they thus return them into court is evidence of such approval, and the formal endorsement loses its essential character."

This matter is fully discussed by Beasley, C. J., in *State vs. Magrath*, 44 N. J. Law, 227, 228; by Moncure, President of the Court of Appeals, in *Price vs. Commonwealth*, XI Oush. 473, 474, the latter saying: "This omission in an indictment is simply the omission of a form, which, if oftentimes found convenient and useful, is in reality immaterial and unimportant." In each of these cases it was held by the court that "the lack of the endorsement was not necessarily, and under all circumstances, fatal to the indictment."

In *Bishop Crim. Prac.*, Sec. 700, it is said: "In the absence of a mandatory statute, it is the better view that both the words 'a true bill,' and the signature of the foreman may be dispensed with if the fact of the jury's finding appears in any other form in the record." See also *State vs. Creighton*, 1 Nott & McC. 256; *State vs. Cox*, 6 Ired. (Law) 440.

In *Gardner vs. People*, 3 Scammon, 83, 87, the court held that "the signature of the foreman, though a statutory requirement, would be presumed if the indictment was recorded. Nevertheless, as it is not an unvarying rule for the grand jury to return into the court only the indictments which they have found, it is advisable at least that the indictment be endorsed according to the ancient practice, for such endorsement is a short, convenient and certain method of informing the court of their action. The defect, however, is waived if objection is not made in the first instance and before trial, for it does not go to the substance of the charge, but only to the form in which it is presented. There is a general unanimity of the authorities to this effect."

In *State vs. Agnew*, 52 Ark. 275, it was held that a statute requiring an endorsement of "a true bill" signed by the foreman, was directory; that objection to a lack of such endorsement was waived unless made before pleading.

In *McGuffee vs. State*, 17 Georgia, while holding that the usual practice of endorsement was advisable, the court said that the objection of account thereof was "an exception which goes rather to the form than to the merits of the proceedings" and too late after trial. See also *State vs. Martins*, 14 Missouri, 94; *State vs. Murphy*, 47 Missouri, 274; *State vs. Shippey*, 10 Minn. 223; *People vs. Johnson*, 48 Cal. 549; *War-Kon-Chaw-Reek-Law vs. United States*, *Morris* (Iowa) 332.

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In this connection reference may be made to Sec. 1025, Revised Statutes, which reads:

"No indictment found and presented by a grand jury in any District or Circuit, or other court of the United States, shall be deemed insufficient, nor shall the trial judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter or form only, which shall not tend to the prejudice of the defendant."

"The endorsement was no part of the charge against the defendant. If no indictment had in fact been found by the grand jury—in other words, if there was no legal accusation against him the defendant should have objected on this ground when the court called on him to plead to this, which it assumed to have been properly presented to it. The very fact of pleading to it admits its genuineness as a record. *State vs. Clarkson*, 8 Ala. 378, 333. Instead of denying the existence of any legal accusation the defendant demurred to it, on the ground of insufficiency, thus abandoning all question of form and challenging only the substance."

In the case before this court the record shows that the grand jury reported an indictment for murder in the case of the *State vs. Muff Williams*. The indictment was filed in court and is itself a part of the record (*Pickrell vs. Commonwealth (Ky.)*, 30 S. W. 617). It charges the defendant with having murdered one Augustin Johnson. He was unquestionably tried and convicted under an indictment found by a grand jury. Defendant's complaint is leveled merely at the word "thru" appearing in the endorsement before the word "bill." The word was evidently intended for the word "true." As written, it was either a slip of the pen, or the mistake of a person whose mother tongue probably was not English as to the spelling of the word or as to the word itself.

In this State, under Sec. 1064 of the Revised Statutes, "every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn and not afterward, and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no such defect had appeared."

The authorities cited show that the objection raised went only to

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form and did not reach the charge presented against the accused. The court was authorized to make the amendment it did and the case properly went to trial.

The judgment appealed from is affirmed.

No. 11,714.

IN THE MATTER OF JOHN D. BELTON, PRAYING FOR APPOINTMENT OF
A RECEIVER.

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Though the shares of a corporation after its creation may be held by a less number of shareholders than that which the law would have required as a condition precedent to the organization of the same corporation, the corporation continues to exist.

Neither the want of officers by reason of failure to elect, or by death, nor the burning of the mill which it was the object of a corporation to carry on, will of themselves work a dissolution of the corporation.

The connection of an officer of a corporation with it is one of personal trust and terminates at his death. The property of the corporation which he had in his possession or custody as such officer does not pass at his death into the possession of and under the control and administration of his administrator. The stockholders have the right to insist that corporate property should be placed in the hands and under the control of corporate agencies.

Where the necessary offices of a corporation having all become vacated by the centring of its stock in the hands of two owners, and by the death of the owner of the majority of the stock, who at the time of his death held the principal office of the company, the administrator of this stockholder, as such, takes possession of all the corporate property and takes no step looking to a replacement of officers, the remaining stockholder has the right to take judicial action looking to the appointment of a receiver by the court. If upon the trial of a demand for such an appointment it should be shown that corporate officers could not be replaced through corporate agencies either by reason of the unwillingness or inability of the stockholders to do so, the court would be authorized itself to appoint a receiver. It would not follow that a third person should be selected as such receiver, nor that the representatives of the deceased stockholder would be deprived of the legitimate influence which they should have in the selection as holders of stock.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Fenner, Henderson & Fenner for Plaintiff, Appellant.

Henry Denis for Mrs. Joseph Menge, widow and natural tutrix,
Defendant, Appellee.

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Argued and submitted November 4, 1895.

Opinion handed down November 18, 1895.

Rehearing refused December 17, 1895.

Plaintiff, together with Jos. Menge and Wm. A. Reese, were the only stockholders of the Edna Rice Mill Company, a corporation organized under the laws of this State; Jos. Menge was the secretary and treasurer, William A. Reese was chairman of the finance committee, and plaintiff the superintendent; on January 15 the rice mill and plant were totally destroyed by fire; on or about the 24th of January, 1894, Joseph Menge died and William A. Reese disposed of his stock to the succession of the said Menge; after the destruction of the mill and plant various suits were instituted by the corporation against various insurance companies, upon policies of fire insurance upon their property held by the corporation, which were pending and undetermined at the time of the death of the said Menge; after his death his wife, Mrs. Ida Menge, as tutrix of her minor children and administratrix of his succession, assumed the administration of the affairs of the corporation generally and the direction of the said suits in particular; and since that time she has continued and is continuing her administration of the affairs of said corporation generally and the direction of the said suits in particular; has compromised all the suits against the insurance companies and has received from them sums aggregating more than fifteen thousand dollars, in settlement of their indebtedness to the said corporation; that she has collected and retains other assets belonging to the said corporation. The plaintiff claims in all these matters Mrs. Menge has acted entirely without legal right, and in her administration of the corporation's affairs is and has been a mere *negotiorum gestor*; that her assumption of the administration of the affairs of the said corporation, and her appropriation of all its assets, was and is a flagrant trespass upon the rights of the plaintiff, who is a stockholder and creditor of the same, and who as such is entitled to require that its affairs shall be properly administered; that the said corporation is now hopelessly derelict—the only stockholders being plaintiff and the succession of the late Joseph Menge, represented by Mrs. Ida Menge as aforesaid; that there are various other creditors unpaid; that to the end that he may be enabled to assert his rights as a stockholder and creditor

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he desires that a receiver should be appointed by the court, in accordance with law and the rights of all interested parties.

Defendant, in her capacity as widow in community of the late Joseph Menge and natural tutrix of the minor children, issue of her marriage with said deceased, excepted to the demand upon the ground that the petition disclosed no legal cause of action, and she prayed that the demand be dismissed, which the District Court considered well taken, sustained the same and dismissed the suit. Plaintiff appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. In the brief filed in this court plaintiff declares that having been unable to effect any satisfactory settlement of his rights with Mrs. Menge, who has arrogated to herself all the rights and powers of the corporate body, he has brought this suit for the appointment of a disinterested third person as receiver and for a judicial settlement of the affairs of the corporation, which is hopelessly derelict, with no officers or duly qualified representatives. He calls our attention to the form of the proceeding as not being an application for the appointment of a receiver on *ex-parte* affidavits, but a demand contemplating a trial upon the merits and a full opportunity for both parties to be heard. He declares that the power of the State courts to appoint receivers in proper cases has been clearly recognized, and that the only question before the court is whether the petition sets out a proper case for the exercise of its power or jurisdiction. He says it is the case of a corporation utterly derelict, with no officers or representatives authorized to take charge of its affairs; that there is no attempt here to divest the properly and legally constituted officers of a corporation of the control of its property and affairs; that it is a corporation without officers; that the administratrix of a deceased stockholder has assumed the administration of its affairs without any further right or authorization than may be implied from the fact that she represents the heirs of her deceased husband, who was a stockholder; that he objects to the exclusive administration assumed by the defendant and demands a judicial settlement of the corporate affairs to the end that his rights as a stockholder and creditor, which are denied by the defendant and, those of other interested parties, may be regularly ascertained and protected. He

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claims that the appointment of a receiver is a matter which rests largely in the discretion of the court, and that this discretion can be intelligently exercised only after a trial upon the merits, when the court will have been put in possession of all the facts.

The defendant resists the application. In her brief she calls our attention to the fact that while plaintiff avers that there are various other creditors unpaid, plaintiff does not say who they are, nor what is due them, nor that they have made any complaint in the premises, nor that they join him in his application or approve of his action. That he does not aver that the property or assets of the company are abandoned, and exposed thereby to loss or damage, but, on the contrary, says that they are under the administration and in the possession of the defendant. That he does not aver that her administration is bad or negligent or fraudulent; that he does not aver that he is exposed to any danger, immediate or remote, of loss or injury from her administration; that he does not aver that she has excluded him from a participation in such possession and administration, nor that he has made a demand upon her for such participation, nor that he has objected to, or remonstrated against, her administration and possession; that he does not aver that he has made a demand upon her for payment of his debt, or that she refuses to acknowledge it or pay it; that he does not aver that the corporation is insolvent; that the averment that the company is derelict is nullified by the averment that defendant administers its affairs as a *negotiorum gestor*; that defendant in the interest of all parties concerned took charge of the affairs of the company, as plaintiff, (from his own showing, an officer and director of the corporation), abandoned the care and management of it, having taken no care to protect its assets from Joseph Menge's death, on the 26th of April, 1894, to the institution of this suit, on the 12th of October, 1894; that plaintiff has been guilty of *laches* and brought about the condition complained of, and has no legal right to apply for a receiver under such circumstances.

She further asserts that plaintiff's petition discloses the fact that the corporation of the Edna Rice Mill Company is extinct, inasmuch as the number of its incorporators is reduced to two, and a corporation can not be composed of less than three persons; that at the extinction of a corporation its property vests in the stockholders, who thereby become joint owners of the same; that therefore, on the

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face of the petition, plaintiff and defendant are simply joint owners of undivided property, each one having a right to hold and possess it until a partition takes place; that the right of the parties in such cases is to demand the partition of the common property, and if necessary the sequestration of it *pendente lite*, but not the delivery of it into the hands of a receiver; that it is doubtful whether a receiver may be appointed in Louisiana as an incident to a partition suit, but that in the absence of a partition suit as a mode of dividing the property and settling the rights and interests of the joint owners between themselves, there being no creditors demanding it, no such appointment can be made.

The plaintiff replies that the question of laches *vel non* can not be raised on the trial of an exception of no cause of action; that such an issue could only be raised and determined on a trial upon the merits and evidence adduced. That it is true that the act under which the corporation was organized requires that there be originally at least three stockholders, and he is not prepared to say what might be the effect in such a case of the subsequent reduction of the number of stockholders to two in so far as the right to continue business as a corporation is concerned; but that *quoad* its liquidation and the rights of stockholders and creditors, the corporation does still exist. That the defendant by purchasing the interest of the third stockholder could not have affected the rights of the plaintiff as a stockholder. That the relations between the parties are exactly what they were constituted in the charter to which both subscribed. They are both stockholders in a corporation and the assets are corporate assets and are to be distributed as such.

The contention of the defendant that the Edna Rice Mill Company has been dissolved—that by reason of that fact the property of the corporation has resolved itself into property held in joint ownership between the stockholders; that the present situation is that of certain joint property in the custody and possession of one of the joint owners, who is entitled to hold possession of the same as joint owner under the rules applicable to that kind of property and subject alone to an action of partition, is not tenable. If his premise that the corporation is dissolved were true it might be that his conclusions would be correct. Possibly Art. 474 of the Civil Code may countenance that pretension, and true it is in an *obiter* in the case of Stark, Receiver, vs. Burke, Watt & Co., 5 An. 741, the organ of this

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court declared that "by the civil law on the dissolution of corporations of the class therein the subject of litigation the property of the corporation belonged to its members and must be divided among them;" but his premise is not true, and the result which he sets up as following therefrom has not arisen in this case. If it be true that by the mere centering of the stock of a corporation in the hands of two stockholders, a less number than the number of stockholders required as a condition precedent to the creation of the corporation, the corporation is dissolved *ipso facto*, and the property at once changes from corporate property to individual property held in joint ownership between the two, then the purchase by a single person of all the stock of a corporation would also dissolve it and convert its property into the individual property of the single stockholder, subject to be disposed of by him at will as such. That is not true. After a corporation has been formed, our law, in express terms, declares that it is "an intellectual being different and distinct from all the persons who compose it (Art. 435); that the estate and rights of a corporation belong so completely to the body that none of the individuals who compose it can dispose of any part of them. In this respect the thing belonging to a body is very different from a thing which is common to several individuals as respects the share which every one has in the partnership which exists between them" (Art. 436); that "what is due to a corporation is not due to any of the individuals who compose it, and *vice versa*" (Art. 437). The rights and obligations of parties would be confounded and thrown into confusion by adopting the rule which defendant contends for.

In Green's second edition of Brice's *Ultra Vires*, page 795, in a note it is said, "A private corporation does not become dormant or forfeit its franchises because a single individual becomes, by purchase of the stock, sole owner of the corporate property and franchises, and if such sole owner continues the business under the corporate name without notice to the public he may be sued as such corporation. *Newton & Co. vs. White*, 42 Ga. 148; *Cook vs. Kent*, 105 Mass. 246."

In Morawitz on Private Corporations, Sec. 1009, the author says: "The decease of all the stockholders in such a corporation, therefore, does not terminate its existence, and it is well settled that all the shares in a corporation may be held by a single person and yet the corporation continue to exist; and if the charter or by-laws

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require certain acts to be done by more than one shareholder, the sole owner may transfer a portion of his shares to other persons so as to conform to the letter of the rule." In support of this proposition he cites the aforementioned case of the Newton Manufacturing Co. vs. White; Russell vs. McLellan, 14 Pick. 69-70, and Baldwin vs. Canfield, 26 Minn. 43. See Fitzgerald vs. Missouri Pac. R. R. Co., 45 Fed. Rep. 819.

It has been held that the owner of all the stock of a corporation is not authorized to pledge the property of the corporation to the prejudice of its creditors. (Stewart vs. Gould, 36 Pac. 277.) In a note on the same page of Brice's *Ultra Vires* it is stated that the want of the proper officers, by reason of failure to elect or by death, does not cause dissolution, though the exercise of the powers of the corporation may be thereby suspended, and that mere insolvency, proceedings in insolvency, the appointment of a receiver or non-user of the powers granted does not of itself work dissolution. The authorities cited in support of these propositions are too numerous to be specially referred to.

We are of opinion that the Edna Rice Mill Company has not been dissolved and that we must deal with its affairs as an existing company.

When Menge, the secretary and treasurer of that company, died, the position which he held being a personal trust did not pass to or devolve upon his administratrix, but became vacant subject to replacement. The corporate property at his death did not pass under the control of the administratrix of the succession of Menge as such.

The plaintiff has the undoubted right to insist that it be placed in the hands of some corporate agency. The situation either admits of this being done extra-judicially by the stockholders and through methods provided for by the charter, or it does not. If it be possible to place corporate matters in the hands of corporate agencies selected by the stockholders themselves and defendant has the means of bringing this about legally, outside of any action by the court, she ought to avail herself of that power and bring that result about; but should she be either unable or unwilling to do so she can not insist that matters should remain as they are forever.

We think plaintiff has made a sufficient showing to entitle himself to a hearing upon the merits. We can not tell whether, when the case goes to trial, the situation at that time will be of such a char-

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acter as to call for the exercise of the court's action in appointing a receiver. If the court should be called on to make such an appointment it by no means follows that a third person will be appointed or that the succession of Menge will be deprived of exercising the legitimate influence to which it will be entitled as a stockholder in the corporation.

The allegations of the petition might have been in some respects more specific than they are, but they are sufficiently so to throw the whole case open to inquiry.

The judgment appealed from is hereby annulled, avoided and reversed and the cause is remanded for further proceedings according to law, costs to await the decision of the lower court.

Rehearing refused.

No. 11,901.

STATE OF LOUISIANA VS. JOHN CASE ET AL., ALEX. CESTIAS ET AL.,
ALPHE. FONTELIEU ET AL.

A PPEAL from the Nineteenth Judicial District Court for the Parish of Iberia. *Voorhies, J.*

M. J. Cunningham, Attorney General, for Plaintiff, Appellee.

A. & C. Fontelieu for Defendants, Appellants.

Submitted on briefs November 9, 1895.

Opinion handed down December 2, 1895.

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Defendants charged with violation of Act No. 7 of 1892, entitled "An act to prohibit the gambling game of craps, and to provide punishment therefor," were found guilty, and each sentenced to pay a fine of fifteen dollars, and costs of suit; they appealed.

This court is without jurisdiction, *ratione materis*, under Art. 81 of the Constitution, to entertain the appeals.

The appeals are dismissed.

The opinion of the court was delivered by NICHOLLS, C. J.

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No. 11,666.

FRANCIS B. WILLIAMS vs. GUSTAVE DREW.

The plaintiff and defendant in a petitory action, having both derived title through a common source, that is to say, an agreement between three persons to make entries of government lands, and divide same between them in certain determined proportions, must look to, and abide by the terms and conditions of acts and contracts made and entered into between themselves, at different times, in reference to said lands, for the ascertainment of their respective interests therein.

And if, during the progress of negotiations, one of the joint owners becomes invested with *complete* title to the whole property, and afterward his heir and legal representative enters into a transaction and compromise with the widow and heirs of another of his associates, in respect to the common property, making a relinquishment to them of all his rights, except as to the portion he reserves and retains, it has the legal effect of an estoppel against the subsequent assertion of any right, title or interest of said heir, or that of his assigns, as against said widow and heir and their assigns.

A PPEAL from the Seventeenth Judicial District Court for the Parish of St. Mary. *Allen, J.*

Beattie & Beattie, Todd & Todd for Plaintiff, Appellant.

Edward Simon for Defendant, Appellee.

Branch K. Miller for Warrantors, Appellees.

Argued and submitted December 1, 1894.

Opinion handed down January 2, 1895.

Rehearing refused December 2, 1895.

The opinion of the court was delivered by

WATKINS, J. This is a petitory action of ordinary form, seeking the recovery of two tracts of land described in the petition, wherein the defendant denies and disavows the title of the plaintiff, and in the alternative that the judgment goes against him, he prays for like judgment against his respective warrantors who are cited to defend this action.

In the court below there was judgment in favor of the defendant and plaintiff has appealed, and in this court he appears and pleads,

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in aid of his title, the prescription *acquirendi causa* of ten and thirty years. The representation of the plaintiff is that he acquired title to a portion of the lands in controversy on the 1st of February, 1893, from W. H. Howcott and Walter R. Brashear, and another portion on the 9th of March, 1898, from Walter R. Brashear alone.

That in the *former* he acquired the following lands, to-wit:

Lots 1, 2, 3 and 5 of S. 12, T. 13, R. 12.

S. E. 1-4 of S. 1, T. 13, R. 12.

Lots 1, 2, 3, 4, 5 and 6 (W. 1-2), S. 24, T. 13, R. 12.

N. 1-2 of S. 2, T. 13, R. 12.

N. E. 1-4 of S. 3, T. 13, R. 12.

Lots 1, 2, 3 and 4 of S. 13, T. 13, R. 12.

Lot 1 and S. E. 1-4 S. 25, T. 14, R. 12.

N. E. 1-4 of S. 33, T. 13, R. 12.

Lots 5 and 6 of S. 36, T. 13, R. 12.

(All land in T. 13, R. 12 E.)

Lots 1 and 3 of S. 25, T. 14, R. 12.

N. E. 1-4 and E. 1-2 of N. W. 1-4, S. 35, T. 14 S., R. 13.

Lot 4, S. 13, T. 15, R. 13.

Fractional S. 11, T. 15, R. 13.

N. W. 1-4 of S. W. 1-4, S. 13, T. 15, R. 13.

Lot 1, S. 14, T. 15, R. 13.

Lot 4, S. 23, T. 15 S., R. 13 E.

Containing 3600 55-100 acres.

That in the *latter* he acquired the following lands, to-wit:

Lot 4, S. 26, T. 14 S., R. 13 E.

W. 1-2 of N. W. 1-4 and N. W. 1-4 of S. W. 1-4, S. 1, T. 15, R. 13.

Lots 4, 5, 6 and 8, S. 2, T. 15, R. 13.

Lot 6 of S. 10, T. 15, R. 13.

Lot 1 of S. 15, T. 15, R. 13.

Lot 1 of S. 22, T. 15, R. 13.

All in T. 15 S., R. 13 E., containing 863 78-100 acres.

It is alleged in the petition that the whole of said lands are situated in the parish of Assumption, wherein the titles are duly recorded; and that the defendant, Gustave Drew, notwithstanding the title thereto was in Walter Brashear and William Howcott, pretending to own the aforesaid lands, entered thereon and cut down and carried away a large number of cypress trees, fully worth ten thousand dollars, and is now illegally detaining and holding posses-

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sion of same and refuses to give them up, although he holds no just title to said property.

Plaintiff's prayer is that his title to said lands be recognized, that he be decreed the owner thereof and placed in possession of same; and that he have and recover from the defendant the sum of ten thousand dollars as the value of timber removed, alleging himself to be duly subrogated to all the rights of his vendor thereto.

In his answer the defendant avers that he is the *bona fide* owner, with titles from the widow and heirs of Henry E. Lawrence, deceased, bearing dates, respectively, June 24, 1889, May 26, 1890, August 23, 1890, and December 10, 1892.

That in the first he acquired the following lands, viz.:

Lots 5 and 6 in S. 2, T. 15, R. 13—164 acres.

Lot 6 in S. 10, T. 15, R. 13—62 acres.

Lot 1 in S. 15, T. 15, R. 13—140 acres.

All in township 15, range 13, containing 240 acres.

That in the *second* he acquired the following lands, viz.:

Lots 5 and 6 in S. 4, T. 13, R. 12.

W. 1-2 of S. 2, T. 13, R. 12.

N. E. 1-4 of S. 3, T. 13, R. 12.

E. 1-2 of S. E. 1-4 of S. 3, T. 13, R. 12.

Lots 1 and 2 of S. 15, T. 13, R. 12.

E. 1-2 of S. E. 1-4 of S. 15, T. 15, R. 12.

All of township 13 of range 12 east, containing 1077.6 acres.

That in the *third* he acquired the following lands, viz.:

W. 1-2 of N. E. 1-4 of S. 12, T. 13, R. 12 E.

N. E. 1-4 of S. 12, T. 13, R. 12 E.

Lot 3 of S. 12, T. 13, R. 12 E.

Lots 3 and 4 in S. 13, T. 13, R. 12 E.

Lots 4 and 5 in S. 12, T. 13, R. 12 E.

Lot 1 in S. 13, T. 13, R. 12 E.

Lot 2 in S. 13, T. 13, R. 12 E.

E. 1-2 of S. E. 1-4 of S. 1, T. 13, R. 12 E.

W. 1-4 of S. E. 1-4 of S. 1, T. 13, R. 12 E.

Lot 3 in S. 15, T. 13, R. 12 E.

Lot 4 in S. 23, T. 15 of R. 13 E.

Lot 1 in S. 14, T. 15, R. 13 E.

Containing in all 1380.47 acres.

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That in the fourth he acquired the following land, viz.:

The N. E. 1-4 of S. 36.

E. 1-2 of S. 25, T. 18, R. 12 E., containing 444.60 acres.

It is further averred that all of said lands are situated in the parish of Assumption, that he is in possession thereof, and that his titles were duly recorded at dates of acquisition.

That the aforesaid lands belonged to the matrimonial community existing between Henry E. Lawrence and his wife at the time of his death, and thereafter became property owned by said widow and heirs in indivision, said property having been acquired by said Henry E. from Effingham Lawrence, Jr., his brother, by an act of sale bearing date April 17, 1848.

That if any of said lands were ever sold and transferred by said Henry E. Lawrence to Robert B. Brashear, said sale or transfer was judicially annulled and set aside, and the property restored to Henry E. Lawrence by a judgment of court rendered in a suit entitled Henry E. Lawrence vs. Robert B. Brashear, in the parish of St. Mary. That he and his authors in title have always been in the quiet, legal and undisturbed possession of the aforesaid property, as owners under *bona fide* titles translativo of property for more than thirty years, and he pleads the prescription of ten, twenty and thirty years in bar of plaintiff's demands.

The answer then specially avers and represents that if Walter Brashear, the only surviving heir of Robert Brashear and his wife, has disposed of any of said lands in favor of the plaintiff, pretending to be the owner thereof, by inheritance from his father, he has done so without any legal right; and that if said Walter Brashear ever had any title therein, he and his vendees are estopped from setting up same against him, because of an agreement and compromise that was made between him and defendant's warrantors and vendors, bearing date January 18, 1881, and duly recorded, wherein Walter Brashear "relinquished in favor of the defendant's authors all their rights of heirship whatsoever in and to all property, and all demands of any and every nature and character, which he might have or could have, for the consideration therein stated; and that if any title whatever rested in Walter Brashear, or his mother (in said property) it springs from their rights as heirs and survivors of Robert B. Brashear, deceased, and the aforesaid act operates as a bar and an estoppel, which is herein pleaded specially."

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The further averment of the answer is that the demand of the plaintiff for damages is frivolous and unfounded; and, in any event, is barred by the prescription of one year; and he especially disclaims the ownership of any lands other than those set out in his answer, and to that extent prays that the plaintiff's demands be rejected.

He cites his vendors in warranty, and prays for such judgment in his favor and against them as the plaintiff may obtain against him.

The warrantors appear and answer that the plaintiff has no title to the lands sued for, for the reason that Walter Brashear, the author of defendant's title and that of Howcott was without right, title or interest of any kind whatever in the lands sued for, because the only title the said Brashear ever had therein was that which he may have inherited from his father, Robert B. Brashear, and that he, by an authentic act of January 18, 1881, renounced, released, acquitted, and assigned to them any and all of his said supposed right, title and interest to them, and divested himself completely thereof. They further represent that, at and anterior to the respective dates on which they conveyed said lands to the defendant, they were the true and lawful owners of the said lands. That they were acquired by Henry E. Lawrence, the deceased husband, and father of the appearers, from Effingham Lawrence, Jr., on the 17th of April, 1848; and that neither Henry E. Lawrence nor they have ever parted with, or been divested of their ownership of same. That if any title to any portion of said lands was ever passed from Henry E. Lawrence to Robert B. Brashear, the same is null and void, and that the nullity thereof has been judicially pronounced in a suit between said parties. That, joining their own possession to that of Henry E. Lawrence and Effingham Lawrence, Jr., it has continued for more than thirty years, and has been lawful, peaceable, continuous, public, unequivocal, actual and corporeal, in the quality of owners of said property under titles transrelative of property and in good faith; and thereupon they plead the prescription of ten, twenty and thirty years.

They pray that the plaintiff's demands be rejected, and in the alternative that judgment should go against them, they allege themselves entitled to be reimbursed the amounts they have expended for taxes on the property, and that the plaintiff be restrained from taking possession until same are fully reimbursed to them.

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The plaintiff prints to an agreement which was entered into on the 22d of May, 1845, between James Dick, Henry E. Lawrence and Robert B. Brashear, relative to the entry of public lands from the United States as the source of his titles to property in suit, the substance of which was that Dick was to furnish the money, and Lawrence and Brashear were to make the selections and to secure the patents therefor, and the titles were to vest in the parties, respectively, in the proportions of one-half in Dick and one-fourth each in Brashear and Lawrence.

He claims that, in pursuance of said agreement, a large amount of lands was entered, principally in the name of Dick, but some in the name of Effingham Lawrence, Jr., supposedly for convenience.

That in 1849 Dick died leaving a last will, whereby all of his property was bequeathed to Mrs. Widow Sarah D. Partee, constituting her his univereal legatee; and that said will was duly probated and the legatee placed in possession.

That subsequently some trouble arose between the parties to the agreement of 1845, which was settled by the execution of the following documents, namely:

1. An act of sale from H. E. Lawrence to Mrs. Sarah D. Partee, of date February 14, 1850, of all the lands entered in the name of Effingham Lawrence, Jr., same having been previously conveyed from Effingham Lawrence, Jr., to Henry E. Lawrence on the 17th of April, 1848.

2. An act of sale from Mrs. Sarah D. Partee to Robert B. Brashear of "all the right, title and interest, property, claim and demand of every kind and nature whatsoever which she now has, or may have or possess, in and to the following described tracts of land," etc.

That in this manner the title became vested in Robert B. Brashear, and at his death it was inherited by Walter R. Brashear, his only child and heir, who conveyed said lands to W. H. Howcott on the 19th of January, 1893, and he in turn conveyed same to the plaintiff by acts of sale February 1, 1893, and March, 1893.

Consequently, the two acts of sale referred to—the one from Lawrence to Partee and that from Partee to Brashear—are of vital importance in determining the title in controversy primarily; for it is evident that, originally, H. E. Lawrence owned one-fourth interest in all the lands that were entered in pursuance of the agreement of 1845, Brashear one-fourth and Mrs. Partee one-half, in virtue of her legacy from Dick.

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There is no claim made that Brashear at any time disposed of his share in the property to any one, and he must therefore have retained same until his death; and as there is only one deed referred to whereby H. E. Lawrence conveyed *any* property to Mrs. Partee as the heir of Dick, it must be examined and considered for the purpose of ascertaining *what* property was conveyed, and whether there remained any interest in the *common* property in Henry E. Lawrence which passed through his widow and heirs to the defendant.

An examination of the deed first named discloses that Henry E. Lawrence only conveyed, in terms, to Mrs. Sarah D. Partee "all the right, title and interest, property, claim and demand of every kind and nature whatsoever which he acquired from Effingham Lawrence, Jr., by the transfer above mentioned, in and to the following lands," describing them, and expressly limiting his contract of warranty "against all lawful claims and demands whatsoever arising from his own acts and against none other," etc.

This act of sale is authentic in form, and was duly signed by H. E. Lawrence and Mrs. Sarah D. Partee in the presence of notary and witnesses.

Claim is made that the recitals of this act disclose that a previous settlement had been made between all parties to the agreement of 1845, but the only recital that the act contains which in any manner indicates such previous settlement is the following, to-wit:

"That after satisfying the claims of said Henry E. Lawrence and Robert B. Brashear, and in all *other* respects and matters complying with and fulfilling the terms and conditions of the said agreement, sundry tracts of land fully described in the patents hereinafter referred to fell to the share of James Dick, who by his last will and testament * * * bequeathed the same to the said Mrs. Partee, his niece.

"Now therefore in consideration of the premises, and in order to carry into effect the agreement aforesaid, the said Lawrence moreover declared that he does by these presents grant, convey, * * * unto Mrs. Partee, * * * all the rights, title and interest * * * which he acquired from Effingham Lawrence, Jr., by the transfer above mentioned in and to the following lands," etc.

But that recital does not state in what manner the claims of Henry E. Lawrence had been satisfied, whether by partition of the common

property or otherwise. Nor does it state in what manner the terms and conditions of the agreement of 1845 had been complied with and fulfilled. Nor does this act purport to describe the sundry tracts of land that fell to the share of Dick. But in so far as such purported settlement is concerned we are left entirely in the dark. As a title this instrument conveys nothing except the lands that were entered in the name of Effingham Lawrence, Jr., and for those there is no consideration expressed in the act. It is a fact that is worthy of observation, that Robert B. Brashear was not a party to that act, and therefore his undivided interest in those lands did not pass to Mrs. Partee thereby.

Consulting the act of sale from Mrs. Sarah D. Partee to Robert B. Brashear, a few years later in date than the act of sale from H. E. Lawrence to her, which makes reference to the previous conveyances, we find the recitals quoted from the former incorporated therein, and to them is subjoined the further statement, viz.:

"And whereas she, the said Mrs. Partee, is *desirous of bringing the said agreement to a close so far as she is or may be interested or concerned, and of terminating and disposing of her interest in the said lands as acquired by her as aforesaid:*

"Now, therefore, for the consideration and on the terms and conditions hereinafter expressed, the said Mrs. Partee moreover declared that she does by these presents grant, bargain and sell * * * unto the said Robert B. Brashear * * * all the right, title, interest, property, claim and demand of every kind and nature whatsoever, which she has or may have and possess in and to the following described tracts of land," etc. (Our italics.)

To this act Henry E. Lawrence was not a party, and by its terms it conveyed to Brashear only the interest or share of Mrs. Partee, leaving that in the same indeterminate situation, in respect to amount or quantity, as before. But in one respect it is certain and definite, and that is in respect to the alleged *settlement* between the parties to the agreement of 1845; but it shows that it was at that date—March 25, 1856—incomplete, for it states that the vendor, Mrs. Partee, was "*desirous of bringing said agreement to a close, so far as she is or may be interested or concerned.*" (Our italics.)

It is, therefore, quite evident that these two instruments do not import—as plaintiff's counsel insist—a transfer from Henry E. Lawrence to Mrs. Partee of *all* the title and interest of the former in the

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lands that were acquired by the parties under the agreement of 1845. It is equally evident that they do not evidence a full and final settlement of the affairs of the joint owners, or a partition and division of the common property, by licitation or otherwise.

Consequently, our conclusion is to give same effect in so far only as the lands that were entered in the name of Effingham Lawrence, Jr., are concerned, as that is the extent to which she acquired title from Henry E. Lawrence.

The plaintiff's counsel has furnished us several schedules of the lands in controversy, which are appended to their brief, and we reproduce some of them for the purpose of making some comparisons as a means of better presenting our views in regard to the titles of the parties respectively.

The following is a tabulated statement of all the lands that were entered under the agreement of May 22, 1845, in the names of James Dick and Effingham Lawrence, Jr., respectively, viz. :

Patent.	Patentee.	Lots.	Sec.	Town.	Range.	Acres.	Date 1846.
2844	J. Dick,	5	15	13	12	80.20	June 13.
2845	J. Dick,	1	15	13	12	80.20	June 13.
2846	J. Dick,	2	15	13	12	80.20	June 13.
2847	J. Dick,	1 or E. $\frac{1}{4}$ N. E. $\frac{1}{4}$	12	13	12	80.20	June 13.
2848	J. Dick,	3 and W. $\frac{1}{4}$ N. E. $\frac{1}{4}$	12	12	12	80.20	June 13.
2849	J. Dick,	E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	1	13	12	80.60	June 13.
2850	J. Dick,	W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	1	13	12	80.80	June 13.
2851	J. Dick,	2, 8, 4, 5	24	13	12	320.00	June 13.
2852	J. Dick,	W. $\frac{1}{4}$	2	13	12	329.40	June 13.
2853	J. Dick,	E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	3	13	12	79.90	June 13.
2854	J. Dick,	W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	3	13	12	79.90	June 13.
2855	J. Dick,	4 and 5	12	13	12	314.75	June 13.
	J. Dick,	and 1	13	13	12		
2856	J. Dick,	1 and 6	24	13	12	520.85	June 13.
	J. Dick,	and 1	25	13	12		
2857	J. Dick,	3	12	13	12	548.84	June 13.
	J. Dick,	and 3 and 4	13	13	12		
2858	J. Dick,	2	13	13	12	90.00	June 13.
2859	J. Dick,	S. E. $\frac{1}{4}$	25	13	12	319.90	June 13.
2860	J. Dick,	and N. E. $\frac{1}{4}$	36	13	12	159.06	June 13.
	J. Dick,	3	15	13	12		
2861	J. Dick,	1, 2 and 3	25	14	12	158.63	June 13.
2864	J. Dick,	5	4	13	12	90.00	June 13.
1849.							
2862	J. Dick,	{ N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ and } 1	16	12	80.50	Nov. 17.	
2865	J. Dick,	{ W. of S. E. $\frac{1}{4}$ } 4	13	12	90.00	Nov. 17.	
		N. 6	26	14	12		
2921	E. Lawrence,	4	35	14	12	306.90	Dec. 45.
	E. Lawrence,	N. E. $\frac{1}{4}$ of E. $\frac{1}{4}$ N. W. $\frac{1}{4}$	1	15	13		
2925	E. Lawrence,	W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and N.	1	15	13	322.82	Dec. 15.
	E. Lawrence,	W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	2	14	13		
2926	E. Lawrence,	5 and 8	13 and 11	15	13	329.97	Dec. 15.
	E. Lawrence,	4	2	15	13		
2927	E. Lawrence,	6	10	15	13	330.35	Dec. 15.
	E. Lawrence,	1	15	15	13		
2927	E. Lawrence,	1	14	15	13	330.35	Dec. 15.
	E. Lawrence,	6	2	15	13		
2927	E. Lawrence,	N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	13	15	13	330.35	Dec. 15.
	E. Lawrence,	1	22	15	13		
	E. Lawrence,	4	23	15	13		

Aggregating over 4500 acres.

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The subjoined tabulated statement shows the lands that are claimed in the petition and those claimed in the answer respectively, viz.:

Lands claimed in Petition.	Claimed in Answer.	Sec.	Town.	R.
Lots 1, 2, 3, 5	Lots 1, 2 and 3	15	13	12
N. E. $\frac{1}{4}$ and Lots 3, 4 and 5	N. E. $\frac{1}{4}$ and Lots 3, 4 and 5	12	13	12
S. E. $\frac{1}{4}$	S. E. $\frac{1}{4}$	1	13	12
Lots 1, 2, 3, 4, 5 and 6		24	13	12
W. $\frac{1}{4}$	W. $\frac{1}{4}$	2	13	12
N. E. $\frac{1}{4}$	N. E. $\frac{1}{4}$	3	13	12
Lots 1, 2, 3 and 4	Lots 1, 2, 3 and 4	18	13	12
Lot 1 and S. E. $\frac{1}{4}$	Lot 1 and S. E. $\frac{1}{4}$	25	13	12
N. E. $\frac{1}{4}$	N. E. $\frac{1}{4}$	36	13	12
Lots 5 and 6	Lots 5 and 6	4	13	12
Lots 1 and 8		25	14	13
N. E. $\frac{1}{4}$ and E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$		35	14	13
Lot 4		18	15	13
Fractional		11	15	13
N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$		13	15	13
Lot 1	Lot 1	14	15	13
Lot 4	Lot 4	28	15	13
Lot 4		26	14	13
N. W. $\frac{1}{4}$ of N. W. and N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$		1	15	13
Lots 4, 5, 6 and 8	Lots 5 and 6	2	15	13
Lot 6	Lot 6	10	15	13
Lot 1	Lot 1	15	15	13
Lot 1		22	15	13

The following tabulated statement shows the lands that Henry E. Lawrence conveyed to Mrs. Sarah D. Partee, and indicates those that are contained in the petition and answer, and also those that are contained in the petition and not included in the answer:

	Sec.	Town.	Range.	Acres.	Patent.
S. E. $\frac{1}{4}$, $\frac{1}{4}$ of S. W. $\frac{1}{4}$ and E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	74	17	16	828.76	2900
X S. E. $\frac{1}{4}$	25	16	13	160.91	2902
O Lot 4	26	14	13		
O N. E. $\frac{1}{4}$ and E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	35	14	13	306.90	2921
O W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	1	15	13		
XO Lots 5 and 8	2	15	13		
O Lot 4	13	15	13	322.82	2923
O Fractional section	11	15	13		
O Lot 4	2	15	13		
X Lot 6	10	15	13		
? Lot 1	10	15	13	399.97	2926
X Lot 1	15	15	13		
X Lot 1	14	15	13		
X Lot 6	2	15	13		
O N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	13	15	13	330.35	2927
O Lot 1	22	15	13		
X Lot 4	23	15	13		

We mark with X all lands claimed in petition and answer. We mark with O all lands claimed in the petition and not in answer.

The following tabulated statement shows the various lands that Mrs. Partee conveyed to R. B. Brashear, viz.:

	Sec.	Town.	Range.	Acres.	Patent.
1 Lot 3	15	13	12	80.20	2844
2 Lot 1	15	13	12	80.20	2845
3 Lot 2	15	13	12	80.20	2846
4 E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, or lot 1	12	14	12	80.60	2847
5 Lot 3, or W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	12	13	12	80.60	2848
6 E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	1	13	12	80.30	2849
7 W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	1	13	12	80.30	2850
8 Lots 2, 3, 4 and 5, or W. $\frac{1}{4}$	24	13	12	320.00	2851

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	Sec.	Town.	Range.	Acres.	Patent.
9 W. $\frac{1}{4}$	2	13	12	320.00	2852
10 E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	3	13	12	79.90	2853
11 W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	8	18	12	79.90	2854
12 Lots 4 and 5.....	12	13	12	314.75	2855
13 Lot 1.....	13	13	12		
14 Lots 1 and 5.....	24	13	12	320.35	2856
15 Lot 1.....	25	13	12		
16 Lot 3.....	12	13	12	349.54	2857
17 Lots 3 and 4.....	13	13	12	80.00	2858
18 Lot 2.....	13	13	12		
19 S. E. $\frac{1}{4}$ of.....	25	13	12	319.96	2859
20 N. E. $\frac{1}{4}$	96	13	12	159.96	2860
21 Lot 3.....	13	18	13	158.65	2861
22 Lots 1 and 2.....	25	14	13	80.00	2862
23 W. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	96	14	13	160.00	2863
24 Lots 5 and 6 (each of 80).....	4	13	12		2864
25 S. E. $\frac{1}{4}$ and E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ and E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	74	17	16	323.76	2900
26 S. E. $\frac{1}{4}$	25	16	13	160.91	2902
27 E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	56	14	13	39.65	2905
28 Lots or fractional.....	23, 80	13	23	555.40	2915
29 E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	25	14	13	306.90	2921
30 Entries.....	13, 11	15	13	322.82	2925
31 Entries.....	14	15	13	329.97	2926
32 Entries.....	23	15	13	330.85	2927

The following tabulated statement shows the lands Walter R. Brashear and W. H. Howcott conveyed to the plaintiff, viz.:

	Area.	Sec.	Town.	R.
1 Lots 1, 2, 3 and 5.....	400.56	15	13	12
2 W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and lots 3, 4 and 5.....	400.73	12	13	12
3 E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ and W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$	110.63	1	13	12
4 Lots 2, 3, 4 and 5, or W. $\frac{1}{4}$	320.00	24	13	12
5 W. $\frac{1}{4}$	320.40	2	13	12
6 E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ and W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$	159.80	3	13	12
7 Lots 1, 2, 3 and 4, or all.....	404.78	13	13	12
8 Lots 1 and 6.....	195.60	24	13	12
9 Lot 1 and S. E. $\frac{1}{4}$	284.91	25	13	12
11 N. E. $\frac{1}{4}$	160.00	36	13	12
11 Lots 5 and 6.....	160.00	4	13	12
11 Lots 1 and 3.....	158.65	25	14	13
13 N. E. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$	226.19	35	14	13
14 Lot 4.....		13	15	13
15 Fractional.....	36.70	11	15	13
16 N. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$	40.00	13	15	13
17 Lot 1.....	46.45	14	15	13
18 Lot 4.....	80.00	23	15	13
Total area.....	3650.55	square acres.		

Instituting a comparison between these several statements, we are enabled to trace the titles of the parties, and from the comparison find the following facts, viz.:

1. The lands which are claimed in defendant's answer, and found in the tabulated statement of lands that are entered in pursuance of the agreement of 1845, are the following, viz.:

	Acres Entered in Name of Dick.
(a) Lots 1, 2 and 3, Sec. 15, T. 13, R. 12.....	319.46
Lots 3, 4 and 5, Sec. 12, T. 13, R. 12.....	326.10
S. E. $\frac{1}{4}$ Sec. 1, T. 13, R. 12.....	160
W. $\frac{1}{4}$ Sec. 2, T. 13, R. 12.....	320
N. E. $\frac{1}{4}$ Sec. 3, T. 13, R. 12.....	169.80
Lots 1, 2, 3 and 4, Sec. 13, T. 13, R. 12.....	417.47
Lot 1 and S. E. $\frac{1}{4}$ Sec. 25, T. 13, R. 12.....	266.96
N. E. $\frac{1}{4}$ of Sec. 36, T. 13, R. 12.....	160
Lots 5 and 6, Sec. 4, T. 13, R. 12.....	160
E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, Sec. 12, T. 13, R. 12.....	90
Aggregating.....	2219.78

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	Acres Entered in Name of E. Lawrence.
(b) Lot 1, Sec. 14, T. 15, R. 13.....	82.94
Lot 4, Sec. 23, T. 15, R. 13.....	82.56
Lots 5 and 6, Sec. 2, T. 15, R. 13.....	190.18
Lot 6, Sec. 10, T. 15, R. 13.....	89.94
Lot 1, Sec. 15, T. 15, R. 13.....	82.94
Aggregating.....	528

(c) W. 1-2 of N. E. 1-4, Sec. 12, T. 13, R. 12—80 acres, is omitted, possibly by mistake or accident.

2. In the foregoing list (a) none are included or covered by the deed from Henry E. Lawrence to Mrs. Sarah D. Partee; but all those contained in list b were conveyed, thus confirming, by the comparison of the tabulated statements, the truthfulness of the recital of the act of sale.

It is therefore evident that the only conflict there is between the titles—on the face thereof—of the plaintiff and defendant, is in respect to the five hundred and twenty-eight acres that were entered in the name of Effingham Lawrence, Jr., and by him conveyed to H. E. Lawrence, and by Lawrence to Mrs. Sarah D. Partee; and as a necessary consequence the plaintiff is obliged to look elsewhere for proof in support of his claim to the remaining 2219.78 acres, which are covered by the deeds of the defendant from the widow and heirs of H. E. Lawrence. Though it is a fact that is apparent on the face of the deeds that the widow and heirs of H. E. Lawrence conveyed to defendant, Gustave Drew, on June 24, 1889, the following, to-wit:

Lots 5 and 6, S. 2, T. 15, R. 13, 164 acres.

Lot 6, S. 10, T. 15, R. 13, 89.94 acres.

Lot 1, S. 15, T. 15, R. 13, 82.94 acres.

And on August 23, 1890, the following, to-wit:

Lot 1, S. 14, T. 15, R. 13, 82.94 acres.

Lot 4, S. 23, T. 15, R. 13, 82.56 acres, which places him in the position of possessor under title, in competition with the plaintiff, who claims to have derived a *previous* title thereto from a common author, H. E. Lawrence, while living—those two deeds covering all the lands which are embraced in the defendant's answer, and designated as those entered in the name of Effingham Lawrence, Jr.

3. It is shown that Mrs. Partee conveyed to R. B. Brashear all the lands described in tabulated statement *a*, *supra*, save and except the following, viz.:

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	Acres.
Lots 1, 2 and 3, S. 15, T. 13, R. 12.....	319.46
Lots 3, 4 and 5, S. 12, T. 13, R. 12.....	328.10
W. ¼ of S. E. ¼, S. 1, T. 13, R. 12.....	80.00
Aggregating.....	725.56

and for these lands she gave to R. B. Brashear no title.

4. It is shown that Walter Brashear and W. H. Howcott conveyed to the plaintiff *all* the lands embraced in tabulated statement a, *supra*, but did not convey—

	Acres.
Lots 5 and 6, S. 2, T. 15, R. 13.....	190.18
Lot 6, S. 10, T. 15, R. 13.....	89.94
Lot 1, S. 15, T. 15, R. 13.....	82.94
Aggregating.....	363.06

in statement b, hence we have the following propositions established by the deeds, viz.:

1. That defendant claims in his answer two thousand seven hundred and forty-seven and seventy-eight one-hundredths acres of land that are embraced in the quantity that was entered under the agreement of 1845; and that of these two thousand two hundred and nineteen and seventy-eight one-hundredths acres were entered in the name of Dick, and five hundred and twenty-eight acres were entered in the name of Effingham Lawrence, Jr.

2. That none of those entered in the name of Dick were conveyed by H. E. Lawrence to Mrs. Sarah D. Partee, but all of those entered in the name of Effingham Lawrence were conveyed.

3. That the widow and heirs of H. E. Lawrence conveyed to the defendant title to the whole of the latter, as well as a large portion of the former, the two parties being thus assigned the position of tracing title to *this portion of the land* through Henry E. Lawrence as a common author.

4. That there were seven hundred and twenty-five and fifty-six one-hundredths acres of the land that were entered in the name of Dick, which Mrs. Partee did not convey to R. B. Brashear; and of those that were conveyed to Brashear, there were three hundred and sixty-three and six one-hundredths that were entered in the name of E. Lawrence, that were not conveyed by Walter R. Brashear and W. H. Howcott to the plaintiff.

Therefore, as before stated, we will omit from present consideration the claim of the plaintiff to the lands entered in the name of Dick, which he derived through Howcott, Walter Brashear and Mrs. Partee, as same is without other foundation than that derived from

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the agreement of 1845, and Mrs. Partee's legacy from James Dick; and will restrict consideration of same, as derived from lands entered in the name of Effingham Lawrence, which was traced through H. E. Lawrence, Mrs. Partee, Walter Brashear and Howcott, to 528 acres, less 363.06—164.94—same being the net balance in the possession of defendant, that is subject to controversy.

On the 28th of May, 1849, Henry E. Lawrence executed an act of sale to Robert B. Brashear for a large amount of land therein described, and among them are those particularly designated as all that were "purchased by the said Lawrence from Effingham Lawrence, Jr., by an act passed before the said Ricardo, notary, on the 18th day of April, 1848;" and also, "all the rights, title and interest, being the one undivided third in and to the lands entered in the name of N. and J. Dick and Effingham Lawrence, Jr., all situated in this State, and containing two thousand acres, more or less."

The price of this sale was sixteen thousand five hundred dollars, on terms of credit, secured by mortgage; and it was accompanied with the renunciation of the wife of the vendor.

But it also appears that, subsequently, Henry E. Lawrence instituted an action of nullity against Robert B. Brashear, which resulted in a judgment on the 3d of April, 1858, annulling the aforesaid sale of the 28th of May, 1849, and wherein it is, among other things, decreed "that all the property described in said act, and transferred and conveyed therein, be and same is hereby restored to the possession of the said plaintiff, under the title under which he holds the same, free from all mortgages and incumbrances," etc.

The object as well as the legal effect of that judgment was to replace the parties in the same relative positions they occupied at the time the sale was originally made.

The important features of these transactions are:

1. That the two parties engaged therein were H. E. Lawrence and Robert B. Brashear, both of whom were parties to the original agreement of 1845.

2. That Dick, the third party, died in 1849, nearly ten years prior to said judgment, leaving his property to Mrs. Partee as his universal legatee, who, on the 25th of March, 1856, conveyed her entire interest to R. B. Brashear during the pendency of that suit and more than two years prior to the rendition of judgment.

It is quite evident that Robert B. Brashear could not acquire any

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right to or interest in the common property from Mrs. Partee during the pendency of that suit, *quoad* the undivided interest of H. E. Lawrence, and that the effect of any mere paper title from Mrs. Partee to R. B. Brashear must have been subordinated to said judgment and controlled thereby. Its effect was to utterly defeat the attempted alienation by Mrs. Partee to R. B. Brashear of the interest of H. E. Lawrence in lands entered in the name of Dick at least.

On the 26th of July, 1860, only a little more than a year subsequent to said judgment annulling said sale, Henry E. Lawrence instituted suit against the legal representatives of R. B. Brashear for a partition of all the properties in which they had interests jointly, growing out of the agreement of 1845, aggregating about five thousand six hundred and seventy-six acres, specifically describing all the dealings and operations of the parties thereunder and all the acts and transactions of the parties in respect to said land, including Mrs. Partee and her conveyance to Brashear and the judgment annulling same.

Henry E. Lawrence died, leaving this suit pending at his death, and a partition was thereby held in abeyance. Affairs remained in this situation until the 18th of January, 1881, when Walter R. Brashear, as sole surviving heir of R. B. Brashear, entered into a compromise settlement with the widow and heirs of H. E. Lawrence, the purport and effect of which is: 1. That said widow and heirs conveyed to Walter R. Brashear full title to certain designated property, or, in other words, they recognized his ownership, by inheritance from his father, of certain described properties. 2. W. R. Brashear, in consideration therefor, gave full acquittance to said transferees of every kind and species of claim and demand which he had or may have urged against them, or any one of them, for any cause whatever, "particularly such demands and claims as he may have (had) against them, or any one of them, by virtue of his being the son and heir of R. B. Brashear," etc.

This appears to be the manner in which the sole heir of R. B. Brashear and the surviving widow and heirs of H. E. Lawrence chose to adjust their differences and settle their disputed rights and interests, and which had remained so long suspended by the pending partition suit.

It did not purport to be a *sale*, but a settlement. It had the effect

of recognizing the undivided share or interest of each, and it recognized the title of Walter R. Brashear to certain specified lands as heir of his father, and relinquished or abandoned any further or other right in his favor as heir.

The suit for the annulment of the former title of H. E. Lawrence to R. B. Brashear was the necessary precursor of the suit for partition, and the compromise settlement terminated the partition suit and adjusted their differences, and is binding on all the parties thereto and has the authority of a thing adjudged. We are satisfied that it operates as a complete bar and estoppel as against Walter R. Brashear and those claiming under him, and prevents their assertion of title derived from R. B. Brashear against the widow and heirs of H. E. Lawrence. And while this estoppel may not have effect as regards Mrs. Partee, as she is not a party to the suit nor to the act of compromise, yet it does affect the assertion of any title that Walter R. Brashear derived by inheritance from his father, although same may have been derived from Mrs. Partee. And our conclusion is that the defendant, possessing a title from the widow and heirs of H. E. Lawrence, who possessed as owners under the transaction and compromise of 1881, can not be divested by the transferees of the heir of R. B. Brashear.

We have consequently reached the same conclusion at which the judge below arrived.

With regard to the plea of prescription that the plaintiff filed in this court, nothing was said in either argument or brief, and we have not discovered anything on the record to sustain it.

On the contrary, the judgment of the court annulling the title made by H. E. Lawrence to R. B. Brashear on the 3d of April, 1858, decreed the plaintiff to be entitled to be placed in possession of all the lands conveyed, including all the lands entered under the agreement of 1845. And the partition suit of H. E. Lawrence vs. R. B. Brashear's legal representatives in 1860, proceeds upon the hypothesis that the plaintiff was in possession and that fact is not denied by the defendants therein.

And by the terms of the act of compromise of the 18th of January, 1881, Walter R. Brashear abandoned and relinquished in favor of the widow and heirs of H. E. Lawrence (the vendors of defendant), all the rights and interests he had derived from the succession of his father—thus renouncing, at least, his *possession* as owner in their favor.

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On this statement there is no basis for the prescription the plaintiff urges, predicated, as it must be, on rights derived from R. B. Brashear and Walter R. Brashear, his heir. In so far as the defendant's pleas of prescription are concerned, no consideration is necessary, as we have found that he possessed a title as owner that did not require the help of prescription.

Judgment affirmed.

ON APPLICATION FOR REHEARING.

There are but two points made in the elaborate briefs of the plaintiff and appellant for a rehearing; the balance is detail.

This is a petitory action, and our decree affirmed the judgment in favor of the defendant, from which the plaintiff appealed.

The foundation of the plaintiff's claim is the agreement which was made on the 2d of May, 1845, by which James Dick, Henry E. Lawrence and Robert B. Brashear engaged to enter lands from the government of the United States, Dick to furnish the money, and Lawrence and Brashear to make the selections and locations.

The *first* proposition assigned in the application is, that our opinion was in error in saying that the "titles were to vest in the parties respectively, in the proportion of one-half in Dick, and one-fourth each in Brashear and Lawrence; the truth being that, under that agreement the legal, as well as the equitable title, was in Dick, and in *him alone*."

The *second* proposition is, that no part of the land claimed in this suit was embraced in the conveyance from H. E. Lawrence to R. B. Brashear, bearing date May 28, 1849.

If either proposition can be sustained on the record plaintiff is entitled to a rehearing.

I.

ON THE FIRST PROPOSITION.

Of course, the agreement was anticipatory, being made in advance of the entries of the land. All entries were made in the names of either James Dick or Effingham Lawrence, Jr., the latter name being used instead of that of H. E. Lawrence, supposedly as a matter of convenience. None of the lands were entered in the name of R. B. Brashear. All the entrance money was furnished by

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Dick, and several thousands of acres of land were selected and patented as stated.

Now, what was the course of the transactions between these different parties, during the following twenty-five years, with reference to these lands, as exhibited by written deeds and other acts? Let us look into the record and see.

But in the beginning it must be remarked that the title of H. E. Lawrence and assigns depends upon the self-same deeds and transactions as does the title of R. B. Brashear and assigns, and that the plaintiff's title is alleged to have been derived from Dick and subsequently from Walter R. Brashear, the son and heir of R. B. Brashear.

Roundly stated, plaintiff's claim is that his ancient author, Dick, was, under the agreement of 1845, the *exclusive owner* of all the lands which were entered in either the name of Dick or Effingham Lawrence, and the equitable interest of H. E. Lawrence in the common property as well as that of R. B. Brashear had been adjusted and settled, and that the defendant acquired nothing from H. E. Lawrence; while on the other hand defendant claims to have derived certain specified lands of those in suit from the widow and heirs of H. E. Lawrence, bearing dates, respectively, June 24, 1889, May 26, 1890. and August 23, 1890, H. E. Lawrence having acquired from Effingham Lawrence, Jr., by an act bearing date April 17, 1848.

The controversy is as to which has the better or paramount title to the property in dispute.

In 1849, only four years after the aforesaid agreement was entered into, Dick died, leaving a will in which he bequeathed to Mrs. Sarah D. Partee all of his property, constituting her his universal legatee. This will was probated and Mrs. Partee put in possession of the estate of the deceased.

On the 14th of February, 1850, within one year after Mrs. Partee became possessed of her inheritance, H. E. Lawrence conveyed to her all of the lands which were entered and stood in the name of Effingham Lawrence, Jr., same having been previously conveyed from Effingham Lawrence, Jr., to Henry E. Lawrence on the 17th of April, 1848.

Subsequently on March 25, 1856, Mrs. Partee conveyed all the right, title and interest she possessed to Robert B. Brashear, and at his death Walter R. Brashear inherited his entire estate, he being the only child and heir. Walter R. Brashear conveyed to W. W.

Howcott on the 19th of January, 1893, and he in turn conveyed to plaintiff.

Consequently, these two transactions, the one between H. E. Lawrence and Mrs. Partee, and the other one between Mrs. Partee and R. B. Brashear, are chiefly relied upon as sustaining the plaintiff's chain of title.

But it is striking that there does not appear any deed from R. B. Brashear to Mrs. Partee of his share of the common property, and there is no reference made to it in the deed of Mrs. Partee to him of *her interest* in the property.

But counsel for the plaintiff insists that the deed from H. E. Lawrence to Mrs. Partee evidences a full settlement of all his interest in the common property.

That deed conveys only certain specified property—that which the vendor had acquired from Effingham Lawrence; and his warranty is limited to claims and demands arising from his own acts, alone.

The following clause in the deed is, however, relied upon as supporting the plea of final liquidation and settlement, viz.:

"That, after satisfying the claims of the said Henry E. Lawrence and Robert B. Brashear, *in all other respects and matters*, complying with and fulfilling the terms and conditions of the said agreement, *sundry tracts of land fully described in the patents hereinafter referred to fell to the share of James Dick*, who, by his last will and testament * * * bequeathed *the same* to the said Mrs. Partee," etc. (Our italics.)

This transaction took place in 1850, soon after the death of Dick; but in the deed from Mrs. Partee to R. B. Brashear in 1856 we find the statement, viz.:

"And whereas she, the said Mrs. Partee, *is desirous of bringing the said agreement to a close*, so far as she is or may be interested or concerned, *and of terminating and disposing of her interest in the lands as acquired by her as aforesaid*," etc. (Our italics.)

If, in point of fact, a full and final settlement had been made with Henry E. Lawrence and Robert B. Brashear in 1850, as intimated in the deed of that year, how can it at the same time be true that in 1856, when the second deed was executed, Mrs. Partee should have still been "desirous of bringing the agreement to a close."

If, in point of fact, plaintiff's present contention were true, that

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Dick was the *sole and exclusive owner of all the lands*, how is that expression in the *former*, viz.: "that sundry tracts of land, fully described in the patents hereinafter referred to, fell to the share of Dick, who by last will and testament bequeathed the same to the said Mrs. Partee," etc., to be accounted for? and how is that expression in the *latter*, viz.: "She was desirous of bringing the said agreement to a close so far as she is or may be interested or concerned, and of terminating and disposing of her interest in the lands as acquired by her as aforesaid," etc., to be accounted for? It is impossible to be done.

Mrs. Partee, the author of plaintiff's title, was a party to each of those deeds. She was vendee in one and vendor in the other. She is fully committed to the recitals of the former deed that certain lands "fell to the share of Dick," and that he, by last will, "bequeathed the same" to her. These recitals in the deeds between Henry E. Lawrence, Robert B. Brashear, and Sarah T. Partee, universal legatee of Dick—all the parties to the original agreement of 1845—are absolutely inconsistent and irreconcilable with the idea that Dick was *sole and exclusive owner of all the lands* which were entered under the agreement of 1845.

Those two deeds are the ones through which the plaintiff claims, and they absolutely disprove the contention he now makes on this application for a rehearing.

Ever if the original agreement of 1845 contemplated such absolute vestiture of title in Dick—though we are confident that it did not—it was clearly competent for them to make such disposition of the property afterward as they chose.

This first proposition is altogether unfounded.

II.

It appears that on the 28th day of May, 1849, prior to the time Mrs. Partee acquired her inheritance from Dick, Henry E. Lawrence executed an act of sale to Robert B. Brashear for a large quantity of land, and amongst those particularly described are the lands which were purchased by him from Effingham Lawrence, Jr., on the 18th of April, 1848, and also "all the right, title and interest, being the one undivided one-third in and to the lands entered in the names of N. and J. Dick and Effingham Lawrence, Jr.," etc.

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The price of this sale was sixteen thousand three hundred dollars secured by vendor's lien and mortgage.

H. E. Lawrence instituted an action against R. B. Brashear for the nullity of the aforesaid sale, and on the 8d of April, 1858, recovered a judgment annulling it and setting same aside, and all the property thereby conveyed was restored to him as owner.

The parties to the foregoing sale and judgment were H. E. Lawrence and R. B. Brashear, two of the parties to the agreement of 1845, and this suit was brought and judgment obtained near ten years after Dick had died and Mrs. Partee, as legatee, had become possessed of his property.

And notwithstanding she had made a title to R. B. Brashear in 1856 to all the lands she had acquired through Dick, no defence was made in that suit on that ground.

It is quite evident that Mrs. Partee could not acquire any title from R. B. Brashear to that land during the pendency of that suit against him.

On the 26th of July, 1860, Henry E. Lawrence instituted against R. B. Brashear a suit for a partition of all the aforesaid lands in which they were jointly interested in virtue of the agreement of 1845, specially enumerating and describing them, as well as all the acts and transactions of the parties to them.

Henry E. Lawrence died leaving this suit still pending. R. B. Brashear subsequently died also.

Afterward, on the 18th of January, 1881, Walter R. Brashear and the widow and heirs of H. E. Lawrence made and entered into a compromise of the partition suit, whereby the rights of the *former* to certain specified land was recognized, and he in turn relinquished his claim to all the remainder to the latter.

The second proposition of plaintiff for rehearing is that the deed of H. E. Lawrence to R. B. Brashear of the 28th of May, 1849, did not include the lands which were covered by the agreement of 1845.

Unless he can sustain that proposition, the judgment must stand.

But in that deed there is a positive declaration that he did convey "all the right, title and interest, being the one undivided one-third, in and to the lands entered in the name of N. and J. Dick and Effingham Lawrence, Jr.," etc., and that certainly referred to the lands which were entered under the agreement of 1845. It could have referred to nothing else.

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Yet, counsel for plaintiff still insists "that not one piece of land described in the act of May 28, 1849, is shown to be in dispute here"—referring to the numbers and description of the lands.

But that may be true, so far as the lands which are particularly described are concerned; yet it is not correct, in so far as their designations as the lands entered in the names of Dick and Lawrence are concerned.

In the suit to annul the sale of May 28, 1849, they were treated as being included, and also in the judgment canceling the sale.

Also in the partition suit between H. E. Lawrence and R. B. Brashear, they are enumerated and described.

Recognizing this to be a fact, and endeavoring to evade the force and effect of those judicial admissions, counsel for plaintiff in his brief, is driven to the necessity of declaring:

"But this whole suit of Lawrence is, on its face, a falsity; he claims that the act of May 28, 1849, referred to those lands."

Surely, counsel can not be serious in desiring this court, on this mere assertion, to declare that suit a "falsity," notwithstanding it was maintained and judgment thereon pronounced more than thirty years ago.

If it was not a fact that those lands were included in that act of sale, how is it that they were included in that suit and judgment?

And if they were not included in that suit and judgment, why is it now decried as a "falsity?"

Having been included in that suit and judgment against R. B. Brashear, both H. E. Lawrence and R. B. Brashear are bound by them, and so is W. R. Brashear, as the son and heir of R. B. Brashear, and W. R. Brashear is plaintiff's immediate author.

This contention is also absolutely groundless.

Rehearing refused.

No. 11,817.

WILLIAM H. FITZPATRICK VS. HUNTER C. LEAKE.

The proceeding to revive a judgment begun within the ten years is effective, followed by the judgment of revival, though rendered after the ten years. C. C., Art. 3547; *Martinez vs. Vives*, 30 An. 818.

The acknowledgment of the judgment debtor that his property has been alienated by a tax sale will not bind the mortgage creditor, or in the least degree interfere with the enforcement of his judicial mortgage claimed to have been cancelled by the tax sale.

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Fitzpatrick vs. Leake.

The title claimed to be derived from a tax sale of property encumbered at the time of the tax sale with a judicial mortgage still of record against the owner, will not be forced on a proposed purchaser under his agreement to buy, unless the tax sale is produced and its *prima facie* effect is unimpaired by testimony.

A PPEAL from the Civil District Court for the Parish of Orleans.
Theard, J.

Dart & Kernan for Plaintiff, Appellee.

Farrar, Leake & Lemle for Defendant, Appellant.

Argued and submitted November 5, 1895.

Opinion handed down November 18, 1895, and December 16, 1895.

The opinion of the court was delivered by

MILLER, J. This appeal is by defendant, condemning him to take the title tendered by the plaintiff to property the defendant had agreed to buy. The defence is that the property is encumbered with a mortgage against a previous owner, J. Q. A. Fellows, or at least that is the only defence necessary to be considered.

Mr. Fellows acquired the property in 1871. It became subject to a judicial mortgage against him in 1880. The judgment giving rise to this mortgage was revived in time, but not reinscribed until June, 1892, when the original inscription had ceased to have effect. Undoubtedly, the reinscription took effect from its date and bound the property, if still the property of Mr. Fellows. Civil Code, Art. 3383; *Shepherd vs. Press*, 2 An. 100.

The plaintiff claims that the property ceased to be that of Mr. Fellows by tax sales, at which Mrs. Montgomery acquired, and who sold to plaintiff in 1892. He contends the tax sales bound Fellows as owner, bound his creditor, purged the property of the judicial mortgage, and hence, the title tendered by plaintiff acquiring from Mrs. Montgomery, the purchaser at the alleged tax sales, is valid.

But the record shows no tax title. There are, it is true, recitals in the deed from Mrs. Montgomery to plaintiff, that she acquired at tax sales on assessments against Fellows. There are also recitals in various certificates put in the record from the Recorder of Mortgages and Register of Conveyances, from the Comptroller and from

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the Auditor, to the cancellation of taxes against Fellows, and to erroneous assessments against him of the property. There are also certificates of non-alienation of the property by Mrs. Montgomery or by Fellows. There is, too, a certificate headed redemption certificate, which, in fact, is a certificate from the mortgage office, of the canceling of judgments against Mr. Fellows in favor of the State. We do not appreciate that these certificates make proof of a tax sale to Mrs. Montgomery, and that sale is the basis of her alleged title.

We are referred to the deed from Mrs. Montgomery to plaintiff, in which Mr. Fellows intervenes, affirming the validity of the tax sales. That binds him unquestionably, but not his mortgage creditor. If there never was any tax sale, or one that passed no title, the mortgage creditor could not be prejudiced by the statement or ratification of his debtor. If that were possible, there would be an easy mode for the debtor to relieve himself from the mortgage.

The issue made by defendant was that the property was encumbered with the mortgage against Mr. Fellows, the previous owner. That issue the defendant supported by proof. If the plaintiff had put in the tax deed showing the tax sale, conceding its *prima facie* effect, and that it bound the mortgage creditor if valid, still the defendant would have had the right to impeach it if he could. But in our view, the plaintiff, failing to put in proof any tax sale, has not made out his case.

We are not disposed to encourage fanciful objections to title. But here is a case in which the defendant is sought to be compelled to take a title, when there is on the records a mortgage against a previous owner reported against the property by the mortgage certificate and claimed to be canceled only by a tax sale, of which there is no legal evidence produced. The defendant alludes in his brief to the fact that it was deemed necessary for Mr. Fellows to intervene in the deed to plaintiff, and we think, the circumstance well calculated to suggest to any purchaser whether, if ratification by the debtor of the tax sales was essential, it would furnish any protection against the mortgage creditor. That doubt we do not think has been removed by the proof called for by the issue. We think the judgment should have been of non-suit, leaving plaintiff at liberty to renew his suit.

It is therefore ordered, adjudged and decreed that the judgment

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of the lower court be avoided and reversed, and it is further ordered, adjudged and decreed that plaintiff's demand be dismissed as in case of non-suit, at his costs.

ON APPLICATION FOR REHEARING.

In this case, both parties concurring in the application to remand, it is ordered, adjudged and decreed that the case be remanded to the lower court, and our previous judgment is avoided and set aside.

No. 11,593.

FRANCOIS ROUGE VS. THE LAFARGUE BROS. CO., LIMITED.

A creditor of the Lafargue Bros. Co., Limited, recognized as such by judgment of the Circuit Court of the United States, having caused a writ of *f. fa.* to issue, under which a seizure was made, certain parties alleging that they were qualified liquidators of the corporation under an appointment from the Civil District Court for the parish of Orleans, in the suit of Rouge vs. The Lafargue Bros., that they were in possession of the property, rights and credits of the corporation, and that the seizure made was an illegal interference with their administration in the State court, ruled in the Circuit Court, the seizing creditor to show cause why an injunction should not issue restraining him from further proceeding. On the trial of this rule the Circuit Court ordered the seizure to be quashed unless within a time fixed the seizing creditor should file a suit in the Civil District Court, attacking the validity of the order appointing the liquidators, but holding matters in the meantime in abeyance. The seizing creditor, within the time fixed, obtained a rule in the suit in which the liquidators were appointed on the plaintiff, the defendant corporation and the liquidators to show cause why the order appointing liquidators should not be annulled, urging among grounds that the court was without power or authority to make the appointment. Defendants excepted to the rule on the ground that the plaintiff in his rule disclosed no cause of action; that the proceeding by rule was unauthorized and not in conformity to the orders of the Circuit Court, and that the plaintiff should have resorted to a direct action. The District Court maintained the exception reserving to plaintiff in rule the right to bring a direct action to annul. *Held:*

The Circuit Court was obviously not concerned as to the manner in which the seizing creditor should proceed in the State court; that it was the attack itself, not its mode, which the court had in view.

The liquidators having themselves, in the rule in the Circuit Court, ruled the seizing creditors to show cause why an injunction should not issue against them, could not object to their doing so by way of answer, and the United States Court having, instead of passing upon the issue, relegated the parties to a trial of the same by the court which granted the order, the rule taken in the Civil District Court was substantially nothing more than cause assigned by the seizing creditors in answer to the rule of the liquidators, though it might not be so in appearance. All parties in interest were before the court which made the order of appointment on equally advantageous ground, and it would be subordinating substance to form to require new proceedings by direct action.

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A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Frank N. Butler for Russmann & Galland, Plaintiffs in Rule, Appellants.

J. Numa Augustin and *W. J. Waguespack* for Liquidators, Defendants, Appellees.

Argued and submitted November 5, 1895.

Opinion handed down November 18, 1895.

Rehearing refused December 16, 1895.

Russmann & Galland, creditors of the Lafargue Bros. Co., Limited, obtained a judgment against that corporation in the Circuit Court of the United States, upon which they caused execution to issue, and under this execution seizures by garnishment were made. When matters were in that situation a rule was served upon them in the Circuit Court, calling on them to summarily show cause why an injunction should not issue prohibiting them from proceeding further in the matter of the seizures. The rule was issued at the instance of Ludovic Lafargue, Adolphe Schreiber and Paul Capdeville, who, in their application therefor, alleged that they had been appointed liquidators of the defendant corporation in the suit of Francois Rouge vs. the Lafargue Bros. Co., Limited, in the Civil District Court for the parish of Orleans, and had qualified as such; that they had been in the full possession of all the assets of the corporation under the orders of the said court, and had been actively engaged in the liquidation of the corporation, and had presented a provisional account of administration, on which Russmann & Galland had been placed as judgment creditors when that firm took out the garnishment proceedings referred to; that all the rights, property and credits of the corporation were at that time legally in the possession and under the control of the liquidators, as officers acting under the authority and orders of the Civil District Court, a court of competent jurisdiction, under a judgment of that court which had never been attacked directly or appealed from, but was in full force and effect, and that the rights and credits which the plaintiffs, Russman & Galland, were

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seeking to realize and control were in the hands of the liquidators for distribution according to law, and that the seizure of Russman & Galland was an attempt to illegally wrest the control of those assets and credits from their hands, which would work irreparable injury to the proper and legal administration of the corporation.

Upon the trial of this rule the court ordered that the garnishment be quashed, unless the judgment creditors, within five days, filed a suit in the Civil District Court attacking the validity of the appointment of the liquidators, and directing that in the meantime matters in the Circuit Court stand in abeyance.

Acting upon the directions of the Circuit Court Russmann & Galland caused a rule to issue in the suit of Francois Rouge vs. The Lafargue Bros. Co., Limited, to show cause why the appointment of the liquidators should not be set aside as having been illegally and improvidently issued. The three liquidators, the Lafargue Bros. Co., Limited, and Francois Rouge (the plaintiff in the suit) were made defendant in the rule.

Defendants in rule excepted that the nullity of the judgment appointing the commissioners could be sued for only by direct action; that the proceeding taken did not conform to the orders of the Circuit Court, which required that a suit not a rule be taken, and that the allegations of the rule did not disclose a cause of action in Russman & Galland to ask for the nullity of the judgment. The District Court sustained the exception and dismissed the suit, reserving to plaintiff the right to bring a direct action.

Plaintiffs in rule appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. In the rule taken by Russmann & Galland, they maintained that the liquidators had never been legally appointed, confirmed or qualified as such, for various assigned reasons, one of the reasons assigned being, that the court was without jurisdiction in the premises, and could not legally take action in the matter of the appointment.

On the argument of this case, counsel of appellants declared that the action taken by the District Court was nothing more than substantially the approval and homologation of proceedings of a meeting of stockholders of the defendant corporation, at which the

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stockholders selected the three persons named as liquidators of the corporation, the order of homologation being followed by an order converting these liquidators so *extra-judicially* selected into *judicial liquidators*, with all the rights and powers of judicial receivers authorized to stop judicial proceedings and otherwise interfere with creditors in the enforcement of their legal rights; that the order complained of was a mere confirmation, at the instance of Rouge, of those proceedings. The record in the case of Rouge is not in the transcript. Counsel should remember that while the judge of the lower court may take judicial notice of his own proceedings, this court has no knowledge of what occurred below, except through the record as brought up. Steps should have been taken in the lower court to have the proceedings in the suit of Rouge brought before us. We see enough of the situation, however, to warrant us in our opinion, in coming to a legal conclusion. The situation of these parties is a peculiar one. The plaintiffs in rule were proceeding regularly in the execution of the judgment obtained by them, when they were met *by a rule* to show cause why further proceedings should not be stayed by injunction, by reason of plaintiffs in rule having been appointed liquidators of the defendant corporation in an order of the Civil District Court, the effect of which, it was claimed, was legally to tie the hands of creditors, and prevent their proceeding against the property of the corporation by way of execution. The liquidators made the order of court the sole basis of their demand. If the defendants in that rule were of the opinion that the court which issued the order was without jurisdiction or power to grant the order which was made the basis of the demand, the defendant, we think, had the legal right, by way of defence and cause shown, to set up that contention. Whether or not they would succeed in that contention is a different matter. We do not think that the plaintiffs in that particular rule, having themselves invoked *Russmann & Galland* to show cause, could object as to the mere form of their doing so by way of answer. *Paxton vs. Cobb*, 2 La. 139; *Quine vs. Mayes*, 2 Rob. 510; *Surgi vs. Colmer*, 22 An. 22; *Stevenson & Co. vs. Riser*, 23 An. 421; *Succession of Coco*, 32 An. 329; *Borde vs. Erskine*, 33 An. 879; *Beltran vs. Gauthreaux*, 38 An. 106; *Succession of Mercier*, 42 An. 1138; *Baker vs. Michinard*, 17 An. 251; *Pasteur vs. Lewis*, 39 An. 5; *Windom vs. McVeigh*, 93 U. S. 288.

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The Circuit Court, instead of attempting to pass finally upon the issues, conservatively relegated the parties to the Civil District Court for a decision upon them. The present proceeding, though not so in appearance, is substantially nothing more than cause assigned by Russmann & Galland (responsively to the rule of the liquidators upon them to show cause) why an injunction should not issue in the Circuit Court restraining them from further proceeding with their seizure in the Circuit Court. In dealing with the question whether a rule was the proper remedy or not to be resorted to by Russmann & Galland, we think the peculiar circumstances under which it was resorted to can fairly be considered, and added as a feature in the determination of the general question of remedy.

We do not conceive that the Circuit Court in directing that in the absence of the filing within five days by Russman & Galland of a suit attacking the validity of the appointment of the liquidators the garnishments should be quashed, attached any particular significance to the manner in which the plaintiffs should proceed in the District Court by way of attack. It was the attack itself, not its mode, which the court had in view. It was (as we have said) substantially a transfer of the rule to the District Court. Plaintiffs' right of attack was, however, independent of any order of the Circuit Court.

We are of the opinion that plaintiffs in rule were authorized to proceed as they did. If the District Court was without power, authority and jurisdiction to grant the order it did, and it was an absolute nullity, the sooner that fact be ascertained and announced the better for all parties.

It is to the interest of all that litigation by which the common property of the debtor is being eaten up by costs should terminate, and that the rights of parties should be determined as speedily as possible, consistently with justice. We see no good reason for forcing plaintiffs to a direct action; all persons in interest are now confronting each other on equally advantageous ground, and it would be subordinating substance to form, to require new proceedings; we see nothing to be gained by it. *Jeffries vs. Bellville Iron Works*, 15 An. 20; *Letchford vs. Dannequin*, 18 An. 150; *Hackett vs. His Creditors*, 43 An. 124; *State ex rel. Brittin et al. vs. City*, 43 An. 833; *State ex rel. Brewing Co. vs. Judge*, 46 An. 100; *State ex rel.*

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Gaiser vs. Judge, 46 An. 110; *State ex rel. Fox & Searles vs. Judge*, 46 An. 114; *State ex rel. Feldner vs. Judge*, 46 An. 116.

The judgment appealed from is hereby annulled, avoided and reversed, and the case is remanded for further proceedings according to law.

No. 11,867.

ERMAN & CAHN VS. THEO. LEHMAN.

The privilege resulting from a seizure or attachment is subordinate to privileges legally existing upon the articles seized at the time of their seizure.

Where a party claiming to act as the authorized agent of an Ohio firm undertakes in Louisiana to enter into, and does enter into an absolute present contract of sale for a certain number of goods of a particular kind and description for a fixed price on credit, and there being no goods of the firm of that kind in Louisiana at that time the party acting for the firm notifies it of the sale and instructs it to ship and deliver the goods to the purchaser under the contract, and the same has been done accordingly, the firm is entitled to a vendor's privilege to secure the payment of the unpaid price as resulting from a Louisiana contract.

The fact that the firm, in order to execute the contract, has in Ohio to select out of a larger number of the designated articles, certain special articles to bring them directly under the operation of the contract, or that it could have repudiated the contract, does not affect the question. The firm having affirmed the contract made on its behalf, the affirmation would give to the contract all the force of an original authority in the agent to have sold at the time, in the place, and in the manner he did. The affirmation being of a sale made by an agent as *in present* and as an absolute sale it would stand affirmed as made with its character so fixed by the parties to it. There would be either no sale at all, or one as made. *Omnis ratihabitio retrohatur et mandato aequi paratur.*

The decision in *McLane vs. His Creditors*, 47 An. 135, reaffirmed.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

Lazarus, Moore & Luce for Plaintiffs, Appellants.

W. S. Benedict for *Elias Block & Sons*; *Bernard Titcher* for *Lachman & Jacobi*; *Buck, Walshe & Buck* for *Mehalovitch, Fletcher & Co.*, and *Old 76 Distilling Company*; *Frank L. Richardson* for *Heitman Bros.* and *R. Monie & Bro.*, for Opponents in Rule, Appellees.

Argued and submitted November 21, 1895.

Opinion handed down December 2, 1895.

47	1651
106	729
47	1651
1110	666
47	1651
e122	146

Erman & Cahn vs. Lehman.

Various attachments were taken against the defendant, Theodore Lehman, under which his stock of merchandise, liquor, etc., were seized by the civil sheriff. The attachments of Erman & Cahn and A. Erman were prosecuted to judgment and the privilege resulting from their attachment was recognized. The stock was sold, and out of the proceeds the first attaching creditor was paid the amount of his judgment. The present contest is over the remainder of the proceeds, plaintiffs, Erman et als., as attaching creditors, claiming to be paid by reason of their privilege, while other parties claim to be paid by preference over them out of the proceeds of sale of different articles upon which they claim vendors' privilege.

Each of these last named parties pointed out the property on which they claimed a privilege before the sale was made. Separate appraisements and sales were made, and the sheriff kept the proceeds of the different lots, thus pointed out, separate and distinct.

After the sale the sheriff filed in court an account in which, after presenting the disbursements claimed to have been made and the costs, and pro-rating them among the various parties, he prepared a proposed distribution of the funds according to the rights of parties as he understood them to be, and ruled all parties into court to show cause why the distribution should not be made in accordance therewith. The parties to this rule were the plaintiffs, Erman & Cahn, Mehalovich, Fletcher & Co., The Old 76 Distilling Company, Lachman & Jacobi Company, Elias Block & Son, Heitman Bros., and Monie Bros.

By the sheriff's tableau he proposed to pay over to each of the parties claiming vendor's privilege the net proceeds arising from the sale of the article on which the privilege was asserted.

Erman & Cahn, plaintiffs in the original suit, opposed the sheriff's tableau of distribution and the payment he proposed to make to the parties mentioned above for the reason:

1. That none of the said parties have any valid claim of indebtedness against the defendant.
2. That if they have any valid claim, they have no lien, privilege or rights whatever on the proceeds of the sales accounted for by the sheriff, the contracts for the sale of the merchandise sold by them to defendant not being Louisiana contracts but having been made, entered into and consummated out of the State of Louisiana in States where the common law prevails.

3. That the goods sold, the proceeds of which were accounted for by the sheriff, have not been identified by the parties as being the goods alleged to have been sold by them to defendant, and are, in truth and fact, not the goods so sold and unpaid for as claimed.

4. That in any and all events, opponents being domestic and attaching creditors, with attachments priming all the sequestrations which the said parties obtained against defendant, and by virtue also of their writ of *fi. fa.*, under which the proceeds were held by the sheriff, and of their lien and privilege resulting from the seizures under attachment and *fi. fa.*, are entitled to be paid by privilege, preference and priority over and before any of the said parties, or any other creditors of the defendant out of the proceeds.

On the trial of the rule the District Court dismissed the opposition of Erman & Cahn, approved and homologated the sheriff's account and tableau, and ordered the funds to be distributed in conformity therewith.

Erman & Cahn appealed.

The opinion of the court was delivered by

NICHOLLS, C. J. We find in the record the following admission:

"It is admitted, and in which admission all parties interested join, that the sheriff's statement annexed to the rule herein, is correct as to his charges as to the sum total of sales, and as to the proceeds, as specified of the property pointed out by the various parties, as subject to their respective rights of sequestration under which they assert their privilege; the question of rank and privilege to be determined by the evidence now to be taken."

The first proposition which we will notice is that last advanced in plaintiff's brief: "that, in any and all events, they have a priority and preference of payment out of the proceeds of the property sold by the sheriff in this case, by reason of the privilege which they obtained under their attachment and their *fi. fa.*"

The parties whose claims to privileges superior to that of the plaintiffs have been recognized by the District Court, do not rest their right upon their sequestrations, but upon the fact that they are unpaid vendors of the various lots of articles which have been sold, and upon the proceeds of which they claim a privilege. It has been repeatedly decided that the privilege resulting from an attachment

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or seizure is subordinated to privileges legally existing upon the property seized at the time of the attachment or seizure.

The real contention of the appellant (one common to the case of all the appellees) is that the court erred in applying the rule of law announced in *McLane vs. His Creditors*, 47 An. 185, to the contracts which are involved in this litigation. They maintain that the facts bearing upon them bring them relatively to the existence of a privilege under the decision in *Clafin vs. Mayer*, 41 An. 1048, "that the contracts were not Louisiana contracts, but were made, entered into and consummated in States where the common law prevails."

The *syllabus* in the *Clafin* case reads as follows:

"Where an agent in New Orleans for non-resident dealers has authority only to exhibit samples and receive orders, which he communicates to his principal for acceptance or rejection; *held*, that an order so transmitted was similar in every respect to an order to purchase sent direct by the buyer to the seller, and when accepted and filled and the goods delivered to the carrier and insured by the buyer, that it was a contract where said order was accepted and filled and the goods delivered."

In the body of the opinion the court, referring to the parties who represented the vendors in Louisiana, said: "The agent's authority here was limited and restricted. He could not bind his principal, and his sole duty was to exhibit the samples, receive and forward orders for goods."

We find in the cases at bar an entirely different state of facts. The authority of the parties who represented the vendors here was not limited and restricted to exhibiting samples and receiving and forwarding orders for goods for acceptance. On the contrary, when the interviews between Theo. Lehman and these various parties terminated, the situation was not that of parties waiting to see whether or not propositions for purchases, which were to be sent forward, would be accepted or not by principals residing in other States and depending upon the action of those persons in order to determine whether contracts would be made or not, but of parties who had then and there made completed contracts of sale, the one as a purchaser, the other claiming to be authorized by their principals to make presently concluded sales, and so making them.

There was no misunderstanding between the parties as to the attitude in which they respectively stood. Lehman did not deal with

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the representatives of the foreign houses as *solicitors for those houses* forwarding *orders* for acceptance or rejection, but as agents of those houses, making present sales for them and forwarding orders not for acceptance or rejection, but *in execution of concluded sales*. The orders sent forward were sent forward solely because the articles which were the object of the sales were in other States and required shipment. Had they been in New Orleans at the time of the interviews, delivery could have been called for there at once by Lehman. Under the evidence in the record there would have been no necessity for any communication between the different agents and their principals to justify the former in making a delivery.

In the McLane case the organ of the court in referring to the authority of Ruffin, who represented the Curtis & Co. Manufacturing Company in Louisiana, said: "It is admitted that Ruffin, who represented the Curtis Co., had full authority to bind it by any contract of sale which he might make, without referring his action to Missouri for its approval or ratification;" but the language used by him did not have the significance which opponent's counsel attach to it, as evidenced by the character of their cross-examination of witnesses in this case in relation to the powers of the different agents. Ruffin's powers were merely incidentally mentioned, as they were not the subject of contest or discussion, and allusions to them were more loosely worded than they should have been. In the case now before the court, the different agents did not assume the position of "drummers" or "solicitors;" they took upon themselves the position of agents of the vendors, with full, present authority to sell absolutely and at once, and they were so dealt with by Lehman. We think they had ample authority to act as they did in making the sales; but were we to assume that they had transcended their authority or disobeyed secret instructions in so doing, it would by no means follow, when their principals (called on to take action in respect to their New Orleans dealings) should affirm them, that the contracts are to be taken as contracts of the place of residence of the principals. On the contrary, the act of affirmance being of a sale made by the agent as one *in presenti*, the act would stand affirmed as made with its character as fixed by the parties to it when made.

The ratification would give to the act all the force of an original authority in the agents to have sold at the time and in the manner

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and at the place they did. *Omnis ratihabitio retrotrahitur et mandato equiparatur.*

The contracts made by the Louisiana representatives of the houses were not submitted to their respective houses for "acceptance," but for "execution," as we have already stated, and the authority exercised by the agents in Louisiana to sell absolutely in that State was ratified (if ratification were needed) and acted upon before Erman & Cahn had acquired any rights in the premises.

We think the contracts were Louisiana contracts, and the rights and obligations of parties controlled by the decision in 47 An., p. 185, of *McLane vs. His Creditors*.

We are of opinion that appellees have identified, with reasonable certainty, the property sold by them, and shown that it was struck by the privilege which they claimed thereon.

We are of opinion that the judgment appealed from is correct, and it is hereby affirmed.

No. 11,887.

PETER GRAHAM VS. ST. CHARLES STREET RAILROAD COMPANY.

The law, protecting the lawful business by which a man gains a livelihood, gives him an action of damages for improper language and conduct of another tending to the injury of that business, the language and conduct being directed and designed so as to affect persons disposed to deal with the injured party, and deter them from buying from him. Civil Code, Art. 2315; 16 La. 206; 9 Robinson, 84; 5 Rob. 115; 10 An. 699.

For such cause of action punitive damages may be given. Civil Code, Art. 1929; 18 La. 535; 2 La. 76; 8 An. 30.

A railroad company is not liable for the language and conduct of one of its foremen, to the prejudice and injury to the business of a grocer, of whom the employees of the company are disposed to buy, the functions of the foreman under his employment being to employ and discharge when necessary, laborers in the service of the company, and his acts and language alleged to have injured the grocer not being within the scope of such functions. Civil Code, Arts. 2317, 2320; 15 La. 169; 18 La. 492; 5 Rob. 113.

Nor in cases where the employer is responsible by reason merely of his relation to the wrongdoer, are vindictive damages allowed. 8 La. 33.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

W. H. Rogers and W. B. Lancaster for Plaintiff, Appellee.

47	1656
110	810
47	165
119	500

Harry H. Hall for Defendant, Appellant.

Argued and submitted December 4, 1895.

Opinion handed down December 16, 1895.

The opinion of the court was delivered by

MILLER, J. The plaintiff, the proprietor of a grocery near the station house of the defendant company, sues for damages, alleging that the foreman of the company, also a defendant, has injured plaintiff in his business by dissuading the employees of the company under defendant's charge from dealing with the plaintiff, threatening them with discharge from the company's employment if they did so, and carrying the threats into effect. The petition charges that this conduct of the foreman has been persistent, prompted by ill will against the defendant, the desire to injure him, and has resulted in diverting the business of the employees from plaintiff. It is further charged that plaintiff, by this course of conduct on the part of the foreman, has been annoyed and humiliated by the notoriety of the persecution and the ridicule thereby engendered, to use the language of the petition, for which punitive damages are claimed; and the liability of the company is put on the ground that the acts and conduct of the foreman were in the course of the employment of the foreman entrusted by the company with the power to employ and discharge those in its service placed under his control. The case was before this court on a previous appeal (*ante*, page 214) from the decision against plaintiff on the exception of no cause of action, and was remanded for trial on the merits. The defence on the merits is the general issue, and from the verdict and judgment thereunder this appeal is prosecuted by them. Plaintiff, answering the appeal, asks that the damages awarded, one hundred and seventy-five dollars, be increased.

The responsibility of a corporation for the conduct of its employees is for such acts as are within the scope of the business of the corporation entrusted to them; as the Code puts it, masters and employers are answerable for the damage occasioned by their servants in the exercise of their functions, and this responsibility, the Code declares, attaches when the master could have prevented the acts causing the damage. C. C., Arts. 2815, 2817, 2820. Thus the

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obligation is put upon the master to select competent and careful servants and holds him liable for their negligence or negligence in the exercise of their duties. The principle has received application in a variety of cases in our reports, where the act of the servant complained of was incident to the discharge of the servant's duty, or rather his mode of performance. In this case the functions of the foreman was the selection of the labor of the company, carrying with it the power to discharge the employees. The damage alleged arises from the motives which it is charged actuated the foreman in his selection and dismissal of the employees. No wrong to plaintiff could have arisen from the engagement or discharge of the employees, but the alleged injury is supposed to have arisen from the discrimination of the foreman against those friendly to plaintiff, who dealt with him or were disposed to buy at his grocery. With that discrimination the company had neither knowledge or connection, and we do not perceive any basis for its supposed liability. The conduct of the foreman was in no sense within the line of his employment. *Gaillardet vs. Damaris*, 18 La. 492; *Ware vs. Barataria and Lafourche Central Company*, 15 La. 169; *Hart vs. New Orleans & Carrollton Railroad Company*, 1 Rob. 181; *Winston vs. Foster and others*, 5 Rob. 113.

With reference to the foreman we think the case is different. The ground of his liability is that from motives of ill will, by words and conduct, he injured plaintiff's business, by preventing the employees from buying at his store. Our review of the testimony satisfies us that the foreman urged a number of the employees not to deal with plaintiff, threatened them with discharge if they did so; raised the rent of premises he leased to one of the employees who dealt with Graham, assigning that as the cause for the increase; for the same reason, it is our conclusion from the testimony, he gave another tenant of his notice to quit, and as to two instances of discharge, the testimony strongly points for the cause to the fact that the discharged men bought of plaintiff. There is also testimony that the foreman, in his efforts to dissuade one of the men from buying of plaintiff, used language in respect to him not at all flattering. The testimony comes from number of witnesses, testifying to distinct acts, and to the conduct of the foreman on different occasions. It would serve no useful purpose to give the testimony in detail. We have given attention to that of the foreman, that he never gave

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orders to the men not to deal with plaintiff, and that his motive was to prevent drinking by the men during the hours of service. We have considered the testimony of the employees, produced by the defendant, that they dealt with plaintiff and were not discharged; that there were posted in the station stringent rules against drinking by the employees, but a careful consideration of the testimony impresses us, as we must conclude it did the jury, that the defendant did use efforts to divert employees from dealing with the plaintiff, and that his motive was not to enforce the rules or discipline of the company.

The right of protection to the citizen in the pursuit of the avocations by which he gains his livelihood is as important as the security of his person and property. No man is privileged to injure another in his business. If the defendant, Newman, by his conduct and language sought to create a prejudice or feeling against plaintiff, deterring those from buying from him inclined to do so, we think reparation is due the plaintiff. Nor is that reparation to be measured by proof of actual damage. Every act of man that causes damage to another obliges the wrongdoer to restitution, is the language of the Code, requiring the obvious qualification that the act must be wrongful, and in the assessment of the damages the exercise of the discretion of the jury or court is admitted. Civil Code, Articles 2315, 1933; *Chataigne vs. Bergeron*, 10 An. 699; *Edwards vs. Turner and another*, 6 Robinson 382; *Fenner vs. Watkins*, 16 La. 206; *Wardens of the Church of St. Louis vs. Blanc, Bishop*, 8 Rob. 84; *McGary vs. City of Lafayette*, 4 An. 440. The fact that the defendant's tenant had a grocery in the neighborhood, apt to be benefited by a diversion of plaintiff's customers, supplies the motive of interest, but does not, in our view, at all mitigate his conduct. With all reasonable allowance for the competitions of trade and the means by which the shopkeeper or merchant obtains business, words and actions to discredit it and injure a rival in business can not be tolerated. The circumstance that the defendant as the foreman of the company had the power to discharge those designed to be influenced by his communications or statements with respect to the plaintiff, and that defendant had the selection of the labor of the company, tended to make more effective his efforts to injure plaintiff in his business. We recognize the principle urged by the defence, that the employer has the right to employ those he chooses, and the same liberty is allowed as to their

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discharge. The authority cited by defendant is entitled to full recognition, that one may do business with those he chooses to deal with, and decline, if he pleases, the business of others. *Orr vs. Insurance Co.*, 12 An. 255. It is not the exercise of defendant's choice in selecting or discharging laborers for the company that makes him liable, but he is responsible, because, in exercising that right, he indulges in language, uses threats, and pursues a line of conduct all directed at the plaintiff, and of a character to injure him in his lawful business.

The jury gave a verdict for one hundred and seventy-five dollars. We do not find the basis to increase it against the defendant, and the amount is sufficient to answer the purpose for which, irrespective of actual loss, the law gives damages in this class of cases. Smart money is not given against those liable, if it all, by reason of their relation to the wrongdoer, and in no respect can we appreciate that the company is responsible.

It is therefore ordered, adjudged and decreed that the judgment of the lower court against the company be avoided and reversed, and that the judgment against Thomas Newman be affirmed, and that he pay costs.

No. 11,920.

STATE VS. MALCOLM MORRIS.

Act 14 of the Extra Session of 1877 and the amendments, do not affect the Section 7 of Act 20 of 1882; the charter of the city of New Orleans.

An ordinance to the extent it may transcend the power vested in the body which passed it, is null and may be taken advantage of by plea or answer to an action to recover the penalty.

The municipal council has the authority, in public interest, to make extensive and varied regulations as to the time, mode and circumstances one shall exercise his right to private property; but without showing cause sufficient an owner can not be divested of his property. *State vs. Payssan*, ante, p. 1029, reaffirmed

A PPEAL from the Sixth Recorder's Court for the Parish of Orleans. *Laresche, Acting J.*

Branch K. Miller for Plaintiff, Appellee.

B. B. Howard and Frank C. Zacharie for Defendant, Appellant.

47 1660
49 829
47 1660
117 571

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Argued and submitted December 3, 1895.

Opinion handed down December 16, 1895.

The opinion of the court was delivered by

BREAU, J. The defendant appeals from the sentence and judgment of the Recorder's Court, condemning him to pay a fine of ten dollars, or in default of payment, to suffer imprisonment during thirty days. The ordinance, he is charged with having violated relates to the removal from any public or private place, of any garbage or dead animal, and makes it unlawful for any other person than the contractor under the city ordinance to remove and dispose of dead animals.

He was engaged, on the day of the asserted violation of the ordinance, by the proprietor of a factory where the bodies of dead animals are reduced to tallow, oil or other products, in collecting dead animals. They were killed by a passing train, and from the ground where the dead bodies were, they were being removed in a closed cart, to the rendering establishment of his employer in the parish of St. Bernard. The employer of the defendant testified, that they were on his dray, and that they were presumably his, as he always pays the owner for the dead animals carted to his factory. The claim is indirectly by the owner of the rendering plant, who, with the defendant, his servant, urges that the enforcement of the ordinance is an interference with the right to follow a lawful occupation.

The first ground of complaint pleaded by way of demurrer to the affidavit is that the ordinance known as the garbage ordinance is in conflict with prior statutes and illegal, viz.: Act 14 of the Extra Session of 1877; Act 42 of 1882, and Act 94 of 1888, relative to the disposition of offal, garbage, night soil and dead animals.

The Legislature delegated to the municipality the power to pass ordinances to protect the health and maintain the cleanliness of the city. It follows as a natural and unavoidable inference, if it be necessary to that end, to remove offensive carcasses, that the city, through its Municipal Council, has the authority to ordain that they shall be removed. It is a necessary incident to the powers expressly granted. While it is true that municipal corporations possess no power not conferred upon them (either expressly or by fair impli-

cation), no principle of interpretation, in our view, would justify the conclusion that the authority to protect health does not include the power to adopt ordinances in terms reasonable, looking to the removal of nuisances. If the ordinance is within the power granted, it must be given the force and effect of a statute.

The question is one of intention. The Legislature having in 1882 adopted an act of incorporation of the city of New Orleans, in which full power is delegated in regard to health, cleanliness, drainage and needful inspection and regulation, it necessarily restricts the effect of any general act that is in conflict with the delegated authority, or that would render inoperative and void an ordinance adopted within the power.

Moreover, the statute of 1877 and the amendments thereto, invoked by the defendant as applying, are not exclusive of other modes. They impose duties upon those engaged in removing dead animals, and prohibits them from dropping in the river dead bodies, save at certain wharves and landings, and orders that they shall tow them in boats from these designated places.

There was a special reason for mentioning how and where to dump dead animals into the river, none for mentioning other means of disposing of these dead bodies on land. In the "absence of prohibition, express or implied, the terms of the statute will not operate as an exclusion under the maxim, *expressio unius*." Sedgwick, p. 31.

As we read the statute, the purpose was to prevent the dumping of garbage and carcasses on the entire river front, thereby polluting the water and infecting the air, and none of the provisions of the statute manifest the intention of adopting exclusive measures requiring all the garbage from all the different points to be dumped into the river and towed away from the places named.

In addition, the act invoked by the defendant applies to the three parishes, Jefferson, Orleans and St. Bernard, and to that extent it is general in its scope.

The special grant of power was not, in our view, repealed by the general law. *Generalia specialibus non derogant* It can not fairly be implied that it was the intention to make subordinate the special laws of the municipality to the general laws covering a larger area and other political divisions. Nothing in the reading of the act shows that it was the legislative intention to curtail and limit the grant of

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power of the city as to any system best adapted to carry out some reasonable scheme for the removal of garbage and dead animals. The recall by implication of a power granted is not favored.

The defendant pleads and argues in ways that he had no thought of acting. He was not carting the dead animals to the river to be there disposed of as the statute would require if in full force within the corporate limits of the city. These dead animals have value at rendering plants, and no one is now anxious that they be carried away and dumped into the river.

But the defendant is not concluded by not complying with the statute he invokes. If controlling in the case and operative, its effect may yet be urged by him in his defence.

This brings us to the second contention of the defendant: that sections of the ordinance are in conflict with and in contravention of Art. 158 of the Constitution, which provides that private property shall not be taken for public purposes without just and adequate compensation.

At this point the question of defendant's want of interest was propounded at the bar, as he was not the owner of the animals, and was only the driver in charge of the cart. If the company, prosecuting in the name of the State, has no right to the dead animals, it might be regarded as a hardship to compel this driver to pay a fine or suffer imprisonment. He had the right to prove that his occupation was legitimate and not in contravention of any law. *Dillon on Municipal Corporations*, Vol. 1, p. 441.

These animals were neither offensive or dangerous to public health. They were private property, not abandoned, and had value of which the owner could not be divested, save by the exercise of police power for the public good.

The necessity for the exercise of that power was not shown. One of the purposes of the contract was to invest the Chemical and Fertilizer Company with the absolute right to take possession of and appropriate all dead animals not slain for human food in certain limits of the city. To sustain that portion of the contract we would have to decide that a dead animal is *per se* a nuisance; that the ownership terminates at death. There is no question here of the exercise of eminent domain for the public good requiring compensation. The only question is the right to exercise the police power *vel non*. If the property is not a nuisance the owner should not be

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prevented from obtaining its value and should not be denied the right to make any disposition of it (however innocent and useful). It is not possible under police regulation to take property from one man and give it to another. The city might, as a sanitary measure, after having given the owner the opportunity to dispose of his dead animals, authorize a contractor to cart them away and appropriate them to his own use. In warm climates the police of cities requires regulations that should be enforced with great vigilance to prevent nuisances injurious to health. The necessity of such ordinances would not justify the council in declaring that all dead animals found in the city not killed for human food are nuisances immediately after death.

This is the effect of the ordinance.

We rest the case entirely on the ground that the owner is entitled to reasonable time after the death of the animal to dispose of it or cart it away under the requirements of existing ordinances. The situation and the climate may render it necessary to permit very little time and opportunity for removal. In adopting ordinances which necessarily must be general the owner may be allowed but little time (if public safety requires) for the removal of his dead animals. The authorities agree that the removal must be made as ordained, and that the courts can not contest the manner in which it shall be done and under what sanitary condition, if reasonable.

However limited may be the right of removal it can not be denied entirely without conflicting with the laws regulating the police power.

The laws do not justify an absolute denial of all the owner's right from the moment of death without the possibility of its becoming a nuisance before a disposition can be made in the owner's interest. The city invested with the power claimed by the plaintiff as plenary in regard to health and cleanliness can, under proper police regulation, permit the owner during a brief period of time to realize any value his dead animal may have, and at the same time carry out a scheme ample in every respect to protect public health and secure required cleanliness.

After re-examination we affirm our decision in *State vs. Payssan*, ante, p. 1029.

The argument at the bar has lead us to re-examine the decision and the result is as just expressed. In that case we declined to en-

Succeſſion of Leverich.

tain jurisdiction of one of the issues, being one of fact exclusively. Here we pass upon the illegality of an ordinance only in so far as relates to the removal of dead animals.

It is therefore ordered adjudged and decreed that the judgment of the court *a qua* be annulled, reversed and avoided, and the defendant discharged.

No. 11,918.

SUCCESSION OF HENRY LEVERICH.

A tutrix administering a succession will be permitted to sell the realty to pay debts upon the recommendation of a family meeting, duly approved, when there is no money or other personal property which may be utilized. The erasure of the mortgage upon property thus sold to pay the mortgage debt is valid.

A PPEAL from the Civil District Court for the Parish of Orleans.
Rightor, J.

Benjamin Rice Forman for Plaintiffs in Rule, Appellees.

Felix J. Dreyfous and *Solomon Wolff* for U. Koen, Defendant in Rule, Appellant.

Argued and submitted December 4, 1895.

Opinion handed down December 16, 1895.

The opinion of the court was delivered by

BREAUX, J. The defendant, adjudicatee of property, appeals from a judgment in favor of the vendor, who is the plaintiff in rule, issued to compel him to accept title.

The property was sold by public auction. It had been appraised at six thousand dollars. The object of the sale was the payment of the debts of the succession.

The mortgage debt affecting it, with interest, was seven thousand seven hundred and ninety dollars, although the natural tutrix, at whose instance it was sold, alleged that the amount was four thousand five hundred dollars.

In addition to the property mortgaged, as already stated, the

 Succession of Leverich.

inventory shows that the succession had household furniture appraised at two hundred and thirty-one and 25-100 dollars and life insurance policies appraised at ten thousand dollars, and the defendant in rule urges that at the date of application to sell the property mortgaged, to pay the purchase price due thereon, there was more than ten thousand dollars available to pay the debts of the succession.

The facts, as relate to these ten thousand dollars, are, that after having obtained the order for the sale of the property, the widow of Henry Leverich, plaintiff in rule, petitioned the court to decree that three life insurance policies mentioned in the inventory and on their face made payable to the insured, his executor, administrators and assigns, were her property and contradictorily with the heir of age and the under-tutor of the minors, judgment was rendered as follows:

“Margaret P. Leverich do have judgment correcting the inventory herein by striking out the three policies of life insurance as assets of this succession, and decreeing that said policies in the Mutual Life Insurance Company of New York,

No. 640,782	\$2,500 00
No. 640,784	2,500 00
No. 640,786	5,000 00
Total.....	\$10,000 00

to be the sole and exclusive property of Mrs. Margaret P. Leverich.”

The family meeting recommended the sale of the property adjudicated to the defendant in rule. The recommendations were duly approved. Subsequently, an account was filed by the tutrix, liquidating the succession. That account also was approved by the judge of the District Court and probated.

Although the minors, when they will be of age, may show that they have been aggrieved, and have the judgments in question rescinded, for they are not finalities, it does not follow that a creditor is bound to wait for the collection of his claim until policies of insurance have been collected.

We must conclude, in view of the proceedings and of the declarations of record, that there were no funds with which to pay the debts, and that the action of the tutrix administering the estate was in the interest of the minors.

We are referred to the case Succession of Dumestre, 40 An. 571, 575.

Succession of Farrelly.

The case here is within a rule announced in that case, as the purpose was in good faith to realize funds for the payment of the debts of the succession of Henry Leverich.

It is, in addition, urged by the defendant in rule that there can be no valid erasure of a mortgage upon a tutrix' property, resulting from the inscription of an inventory of an estate in which minors are interested, until the minors become of age and discharge their tutor, or until a special mortgage is given in accordance with law.

The rule invoked is not universal in its application. It is subject to exceptions. Notably here, the property was sold to pay the purchase price, dating anterior to the minor's mortgage. It follows that the mortgage upon that property must be canceled, and that the adjudicatee can insist upon its cancellation prior to payment of the price, and that the cancellation in this case will be binding upon the minor children of the late Henry Leverich, who can have no interest to sue, to annul and set aside a sale, even if their mother and tutrix has delayed more than she should in collecting the policies of insurance of their late father, or has in error changed the name of the beneficiary under these policies. The question, if it be one, can not fix infirmity upon a title to realty sold under the circumstances here.

The proceedings are regular as to form.

Moreover, it is manifest that the tutrix, as survivor in community, has an interest in the total of the mortgage (as shown by the certificate of mortgage), that as against third persons would considerably lessen the minor's mortgage, and finally, granted that as to an amount, it will be decreed on their suit, at their majority, that they have an actionable interest against their tutrix, it can not affect a title based upon the vendor's privilege duly recognized (for the payment of which the property was sold).

The judgment appealed from is therefore affirmed.

No. 11,908.

SUCCESSION OF WIDOW PATRICK FARRELLY.

The appointment of a testamentary tutor by the father, acquiesced in by the surviving widow, will not prevent her, when the tutor so appointed fails to qualify, from nominating a tutor by will to the minor children.

Succession of Farrelly.

If she has nominated a tutor and the tutor appointed and nominated in the will qualifies after her death and the probaton of the will, the appointment and qualification are null, and the last appointed tutor will be maintained in the tutorship.

A PPEAL from the Civil District Court for the Parish of Orleans.
Ellis, J.

W. S. Parkerson for Executor, Appellee.

Frank McGloin for Tutor, Appellant.

Argued and submitted December 8, 1895.

Opinion handed down December 16, 1895.

The opinion of the court was delivered by

McENERY, J. Patrick Farrelly died May 26, 1894. In his will he named and appointed his son, Peter Joseph Farrelly, tutor to his minor children. The surviving widow acquiesced in this dative tutorship, and joined with the son in praying for his confirmation as tutor. On September 14, 1894, the inventory taken in the succession of the deceased was filed, and the usual order was issued, confirming the appointment of Peter Joseph Farrelly as tutor, upon his giving bond and complying with all the requirements of the law. No letters of tutorship were issued to him, and he did not qualify by taking the oath and giving bond during the life of Widow Farrelly. On May 8, 1895, the widow died, leaving a will in which she appointed Bernard J. Reilly testamentary tutor to the minors. Her will was admitted to probate, and ordered executed. Reilly was also made executor without bond. On May 14, 1895, Peter J. Farrelly, by virtue of his petition to be appointed and confirmed as tutor, and the order issued thereon September 14, 1894, took the oath as tutor and received the letters of tutorship.

After his appointment as stated, Peter J. Farrelly, claiming to be the legal tutor, brought this suit against the tutor appointed by the Widow Farrelly, demanding the surrender of the estate of the Widow Farrelly to him as the tutor of the minors, and also to obtain possession of the minor children. This petition was answered by the

Succession of Farrelly.

tutor, who had not yet qualified, appointed under the widow's will, and all the averments of the plaintiff denied. The issue as to which person the tutorship belongs was thus presented by Peter J. Farrelly and accepted by the defendant.

We recognize the principle urged as the preliminary issue by plaintiff, that a direct action is necessary and specific grounds must be alleged in order to annul a judgment affecting a tutor. But here there have been two tutors appointed, and the one brings a suit against the other in possession of the property, and the persons of the minors to get possession of the same. To this suit the answer is made by defendant that he is the testamentary tutor of said children, and as such is anxious and willing to qualify, and he prays that he be quieted in his possession as executor, and declaring him as tutor to be entitled to retain the control of the persons of said minors.

The issue as to who is entitled to the tutorship is squarely presented so that we can determine who is the legal tutor, and we are not disposed, in exceptional cases like the present, to sacrifice substance for form, as expressed by the lower judge, and dismiss the case in order that a direct action may be brought by the respondent to set aside and annul the appointment of Peter J. Farrelly, the plaintiff.

It seems that the letters of tutorship to Peter J. Farrelly had been inadvertently issued after the death of Mrs. Farrelly and the probate of her will. All these matters were before the same judge, who, in tutorships, must often exercise a wise discretion in the management of the affairs of minors. It seems that in this case, to save the estate of the minors from protracted and useless litigation, he has exercised a sound judgment in deciding that the issues presented can be solved in this proceeding.

Peter J. Farrelly failed to qualify as tutor during the life of Mrs. Farrelly. Her consent to his confirmation as tutor was based on the presumption that he would qualify. She knew that her children must have a tutor, and was she to presume that this plaintiff would qualify as tutor of the children after her death? Peter J. Farrelly having failed to qualify within a reasonable time, it was within the power of Mrs. Farrelly to resume her right as natural tutrix. At her death Peter J. Farrelly's right to act as tutor ended by the assertion of the right she had to appoint a tutor to her children by testament. In the face of the declaration of the will of Mrs. Farrelly appointing the defendant testamentary tutor, the letters issued to plaintiff and his qualification were absolute nullities.

Succession of Farrelly.

Article 271 of the Civil Code provides that whenever it shall occur that no one will take upon himself the tutorship of the minors, and comply with the existing laws by giving the required security, it shall be the duty of the judge to summon a family meeting, and, with its advice, to nominate a discreet and responsible person in the parish to be tutor and another to be under-tutor.

The plaintiff having failed to qualify within a reasonable time, it was the duty of the judge, in pursuance of said article, to convoke a family meeting, and, with their advice, to appoint a tutor to the minors. The plaintiff neglected to qualify before the death of Mrs. Farrelly, upon whose consent alone he was entitled to the tutorship. In her testament she appointed, in consequence of the default of the plaintiff, a tutor. As the surviving spouse she had the right to appoint the tutor, and having done so, this relieves the judge from the necessity of calling a family meeting, and he was therefore right in his ruling when he ignored the letters issued to the plaintiff after the death of Mrs. Farrelly, and confirmed the tutor nominated by her.

It is urged, and French authority is quoted (Fuzier-Herman Code Annoté, Vol. 1, Art. 397, note 4) that it is essential that the last dying father or mother should be invested with the tutorship, and that if either has not accepted the tutorship, or has ceased to discharge its functions, because of the resignation or other reasons, the right is forfeited to designate a testamentary tutor. It is unnecessary to determine whether or not such a principle has been incorporated into our law by the adoption of the present Code, mainly taken from the Code Napoleon. It is not found in the Code, and we have no adjudications on this point. In the instant case, if such a principle were adopted, we do not think it would apply to the facts in this case. The mother, dying last, never neglected the tutorship. In obedience to the wishes of her deceased husband, she joined in the application to have the tutor nominated by him appointed. In thus acting, she did not refuse the tutorship, nor was she appointed tutrix and resigned the trust. We do not think her act was such as to forfeit the nomination of tutor by testament.

It is a right to appoint a tutor by will that is accorded to the husband or wife dying last, and in order to forfeit this right, there must be a clear renunciation of the right, equivalent to an absolute abandonment of interest in the minors' welfare, or a failure to be

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maintained in the tutorship of the children, on a second marriage, of children by the first marriage.

This view of the case, the maintaining of the appointment of the testamentary tutor by the widow Farrelly dispenses with the question raised as to the seizin of the executor. The tutor is also executor, and as tutor he has a right to the administration of the minor's property.

Judgment affirmed.

No. 11,857.

SAMUEL H. BEMISS VS. NEW ORLEANS CITY & LAKE RAILROAD COMPANY.

It is negligence to go from one car to another while the train is in motion. If a passenger on a train in motion attempts to go from one car to another, and is thrown from the platform by the sudden jerk of the train, the defendant corporation is not responsible. In such a case the defective coupling of the train will not justify a verdict in favor of plaintiff, as the passing from one car to another is the proximate cause of the injury.

A PPEAL from the Civil District Court for the Parish of Orleans.
Elks, J.

Carroll & Carroll for Plaintiff, Appellee.

Denegre & Denegre for Defendant, Appellant.

Argued and submitted December 5, 1895.

Opinion handed down December 16, 1895.

The opinion of the court was delivered by
 McENERY, J. The plaintiff brought this suit to recover damages for personal injuries inflicted upon him by the defendant corporation.

The defence is a general denial, and negligence on the part of plaintiff. There was judgment in favor of the plaintiff in the sum of seven thousand four hundred dollars. The defendant appealed.

There is some conflict of testimony as to whether the plaintiff received the injury while stepping or jumping from the car when in

Bemiss vs. Railroad Company.

motion, or whether he fell from the platform of the car while in motion, by a sudden jerk in accelerating the speed of the train. We are inclined to the opinion that the weight of testimony is to the effect that plaintiff jumped from the car while the train was in motion, and fell in such a position that his foot was caught by the wheels. But there is no difference in principle, so far as plaintiff's negligence is concerned, whether he met with the accident in jumping from the platform, or whether he was injured by stepping from one car platform to another.

The plaintiff's testimony is as follows:

"I was out to the base-ball game on Saturday, the 21st, and was coming in on the train, which was well crowded. I was sitting on the last seat on the platform; and as the train got in between Dryades and Baronne streets, coming almost to a stop, a considerable number of people getting off, I said to a party sitting next to me: 'Let us walk up in front so that we can be near the electric cars.' The crowd was running through the cars. We crossed through two cars, and came to the last platform. * * * I stepped across, and just as I got over my balance the train gave a jerk and threw me between the cars."

Q. "That is, while the train was coming in you walked forward?"

A. "When the train got almost to Baronne, between Baronne and Dryades, I got up from my seat and crossed between the cars, and came to the platform of the second car. The train was barely moving; and as I came there and made a step I got over my balance, and the train gave a jerk just at that time and threw me over. It (the train) went up so far that the first truck of the second car struck me."

Q. "Did you fall on the side toward the up-town side or the down-town side of the car?"

A. "On the Baronne street side of the car, on Canal street, with my head toward the cemeteries."

Q. "Who got on the car—most of the passengers; how do they get on those cars?"

A. "On the side."

Q. "So that it is one continuous platform, is it not, all around?"

A. "Yes, sir."

Q. "Had you ever seen those (open) cars before that day?"

A. "Yes, sir."

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- Q. "Been in them frequently?"
- A. "Yes, sir."
- Q. "You had been to and from the lake on them prior to this accident?"
- A. "Twice to the lake."
- Q. "And to the base-ball park a number of times?"
- A. "Yes, sir."
- Q. "From the place where you were sitting, if you had waited until the car stopped, couldn't you have alighted with ease?"
- A. "Yes, sir."
- Q. "You had simply to step from the seat where you were seated out on the side, and on the ground?"
- A. "If I had waited for the car to stop?"
- Q. "Yes, sir."
- A. "Yes, sir."
- Q. "Instead of waiting for the car to stop, and getting off from your seat, you preferred that day to go on through two cars on to another platform, from which you say you were injured. This is a fact, is it not?"
- A. "Yes, sir."
- Q. "What exactly was your position? Were you trying to step off the car?"
- A. "No, sir; I was stepping from one platform to the other."
- Q. "When you were stepping from one platform to the other, why is it you did not hold on to the railing?"
- A. "*I just had my hands lying lightly on the rails, when I got over my balance, when the jerk came and threw me off my balance entirely.*"
- Q. "So that while this car was in motion you went from one car to the other, and simply placed your hand on the top of the rail without holding it?"
- A. "Yes, sir."
- Q. "Well, if you were in no particular hurry, why didn't you stay in your seat until the car came to a standstill, and those people on the outside platform would have gotten off?"
- A. "Well, it would have taken considerable time, and those cars stopped on the other side of Baronne street and I would have had to walk it anyhow."
- Q. "What do you mean, Mr. Bemiss, by a sudden jerk?"

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A. "A sudden pull."

Q. "Forward?"

A. "Yes, sir."

Q. "To pull the cars over a little further toward Canal and cross Baronne street?"

A. "A little further toward the river."

Q. "So that was a pull forward of the cars that had not yet come to a standstill, in order that they might get further away from Baronne street?"

A. "Yes, sir."

From the testimony of plaintiff it is shown that when the train nearly reached Baronne street it was barely moving. We presume this slow motion of the train was dictated by prudential motives in crossing Baronne street. At any rate, the train had not reached its destination, and there was no invitation, express or implied, for the passengers on the train to leave their seats for the purpose of getting off the train. The station is on Canal street and in the full view of every one, and is generally known to the citizens of New Orleans. The plaintiff had been a frequent passenger on the train and must have known the place where the train permanently stopped.

The cars were equipped with a platform or step on each side, were open cars, and the passengers had only to step on this platform and then to the ground in order to leave the train with safety.

While the train was moving so slowly the plaintiff might have left it with comparative safety had he employed the means which the defendant had placed at his disposal.

It is certain, from plaintiff's testimony, had he left his seat while the train was in motion and gone on the platform and attempted to step from one car to another, the accident would not have happened.

If the plaintiff had exercised reasonable care the injury would have been avoided. It would be useless to argue and cite authorities to this effect, that the stepping from one car to another without inducement or invitation or on a necessary errand while the train is in motion is dangerous and negligent.

In such a case the rule expressed in *White vs. V., S. & P. R. R.*, 42 An. 990, applies:

"In a suit for damages for injuries caused by alleged negligence of

Hemiss vs. Railroad Company.

defendant, recovery requires that the record should establish (first) that the defendant was guilty of no contributory negligence, but for which, notwithstanding defendant's negligence, the injury would have been avoided." This doctrine has been uniformly adhered to in the jurisprudence of this State. *Damont vs. Carrollton R. R. Co.*, 9 An. 441; *Hanson vs. Mansfield Railway and Transportation Co.*, 38 An. 111; *Woods vs. Jones et al.*, 34 An. 1087; *Deikman vs. R. R. & S. S. Co.*, 40 An. 787; *Weeks vs. R. R. Co.*, 40 An. 800; *Curley vs. R. R. Co.*, 40 An. 810; *Oaldwell vs. R. R. Co.*, 41 An. 624; *Walker vs. R. R. Co.*, 41 An. 796; *Moore vs. Edison Illuminating Co.*, 43 An. 792; *Byrd vs. City R. R. Co.*, 43 An. 822; *Herlisch vs. R. R. Co.*, 44 An. 280; *Schulte vs. R. R. Co.*, 44 An. 509; *Clements vs. Electric Light Co.*, 44 An. 692; *Ryan vs. Railway Co.*, 44 An. 806; *Blackwell et al. vs. R. R. Co.*, 47 An. 268; *Smith vs. Crescent City R. R. Co.*, 47 An. 833.

In *Moore vs. Edison Illuminating Company*, 43 An. 792, the suit for damages was founded on the injury a passenger in a street railway car received by putting his head out of the car window, which came in contact with a post. This court said, "plaintiff's negligence consists in putting his limbs where they ought not to be and exposing them to be broken without his ability to know whether there is or not danger approaching." In the instant case, the plaintiff voluntarily placed himself in a dangerous position, without his ability to know whether the car would be given a sudden jerk or not, or whether its equipments were in proper order. He was in a place where he ought not to have been, and where he voluntarily placed himself.

"In actions for injuries through negligence it is a general principle that a person is answerable for the consequences of his negligence only so far as they are the natural and proximate result of the injury, as might have been anticipated by the ordinary forecast, and not for those consequences arising from a conjunction of his faults with circumstances of an extraordinary nature." *Weeks on Damnum abaque injuria*, Sec. 115, p. 230, which is quoted approvingly in the above case.

In this case it is no justification to say that the plaintiff was going to a car on the train from which he could alight and be in closer connection with the Baronne street cars. It was no excuse for his movement from one car to another. Certainly the defendant corporation

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had no reason to anticipate such a movement on his part, and there was then no obligation on its part to provide against an unforeseen occurrence by having its equipments in order to meet such an improbable contingency. If the plaintiff had been in his seat or even standing in his car and the injury had been inflicted upon him by the defective equipments in the car coupling, which it is alleged caused the sudden jerk, he would have just cause for subjecting the defendant to damages. The evidence does not sustain the charge that the equipments in coupling were defective or the cause of the injury the quick accelerated movement of the car. This movement was natural and to be expected. The train had, in crossing Baronne street, reduced its speed. To reach its designation, in the language of plaintiff, there was a sudden pull forward of the cars, which had not yet come to a standstill, in order that they might get further away from Baronne street. In this movement we can not appreciate the negligence of defendant.

In *Woods vs. Jones*, 84 An. 1086, it was held that a railroad company is not liable to a passenger for an accident which the passenger might have prevented by ordinary attention to his safety, even though the agents in charge of the train are also remiss in their duty. And this was in accordance with the doctrine now universally received that, although the defendant's negligence may have been the primary cause of the injury, an action for such injury can not be maintained, if the proximate and immediate cause can be traced to the want of ordinary care and caution of the person injured. *Grand Trunk Railway vs. Ives*, 144 U. S. 429; *Inland and Seaboard Coasting Co. vs. Tolson*, 139 U. S. 551; *Thompson on Negligence*, 115, 117; 2 *Thompson on Negligence*, 1178; *Parkerson's Railway Accident Law*; *Cooley on Torts*; *American and English Encyclopedia of Law*, *Contributory Negligence*; *Damont vs. N. O. & Carr. R. R. Co.*, 9 An. 441; 83 Ill. 354; 5 Bradw. 242; 19 Conn. 566; 63 Conn. 26; 78 N. Y. 480; 101 Mass. 455; 104 Mass. 237; 56 N. W. 512; 57 Fed. 921; 34 Fed. 300; 26 S. W. 509; 33 P., 283; 25 N. Y. S. 1009; 34 N. Y. S. 978; 23 S. W. 42; 61 N. W. 514; 17 So. R. 253; 21 S. E. 571; 34 P. 124; 31 S. W. 185; 32 N. E. 356; 16 S. E. 813.

In the case of *Brashear vs. Railroad Co.*, 47 An. 735, confidently relied upon by plaintiff, it was ascertained as a fact that the plaintiff was invited by the train signal to go to the platform.

We find no applicability of the other authorities cited by plain-

State ex rel. Milliet vs. Recorder.

tiff to the facts of the case under consideration. The proximate cause of the accident was not the sudden jerk of the train in moving; but plaintiff's contributory negligence in voluntarily placing himself in a dangerous position. *Foster vs. Mo. Pac. Ry. Co.*, 21 S. W. 916.

It is therefore ordered, adjudged and decreed that the judgment appealed from be annulled, avoided and reversed, and it is now ordered that plaintiff's demand be rejected at his costs.

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No. 12,011.

THE STATE OF LOUISIANA EX REL. PAUL MILLIET VS. A. M. AUCOIN,
RECORDER OF THE SECOND RECORDER'S COURT.

It is an imperative requirement that the examination by a committing magistrate must be taken as soon as the circumstances of the case will permit. But in the exercise of a sound discretion he may postpone the examination, if the witnesses, important and material for the State, are in no physical condition to attend the examination.

If the bail exacted by the Recorder is excessive, the accused can appear by simple motion before the Criminal Court and have the same reduced.

We will not entertain an application for reduction of bail until all remedies have been exhausted below.

APPPLICATION for a Writ of *Mandamus*.

Sambola & Ducros and H. N. Gautier for Relator.

Submitted on briefs December 7, 1895.

Opinion handed down December 16, 1895.

The opinion of the court was delivered by

MCENERY, J. The relator was charged before the Second Recorder's Court of the city of New Orleans with having wounded two parties with intent to murder.

It is alleged in the application for relief that the relator has been in custody since the 10th of November, 1895, on commitments of the recorder, without benefit of bail. The relief prayed for is a *mandamus* compelling the recorder to examine the case and admit the relator to bail.

State ex rel. Milliet vs. Recorder.

The answer of the recorder is as follows:

"And now comes A. M. Aucoin, recorder of the Second Recorder's Court, and in answer to the order of this honorable court, to show cause why the writ of *mandamus* should not issue herein, says: That he is now and has ever been willing and ready to examine and investigate the accusations and complaints mentioned in relator's petition against Paul Milliet, and that he has, up to this time, been unable to do so, because the evidence of one Thomas Kenny is important and material, and without whose evidence respondent verily believes the State can not safely proceed to examine and investigate said accusations and complaints against the said Paul Milliet; that it is alleged, in one of said complaints against said Paul Milliet, that he (Milliet) shot and wounded Thomas Kenny with intent to murder; that in the other of said complaints, it is alleged that at the same time and place Milliet shot and wounded Thomas Monday with intent to murder; that Thomas Kenny is now confined and is dangerously ill in the Charity Hospital, suffering from the effects of a gunshot wound alleged to have been inflicted by Milliet; that Thomas Kenny is now physically unable to give his evidence in the said cases against Paul Milliet, on account of said wounds, and the said Kenny is not yet in such a condition of mind as to make his declarations (dying declarations). And respondent, further answering, says that he has fixed the amount of bail in the cases against Milliet as follows: In case of shooting and wounding Thos. Kenny with intent to murder, twenty thousand dollars; in the case of shooting and wounding Thomas Monday with intent to murder, five thousand dollars."

It appears from the statement of the respondent that the wounded parties, who are the most important and material witnesses on behalf of the State, are in no physical condition to appear in court and give their evidence on the examination.

It is an imperative requirement that the examination must be taken as soon as the circumstances of the case will permit.

In the case of *State ex rel. Matranga vs. Recorder*, 42 An. 1091, we said: "That although the recorder be bound to proceed with the case before him, we are not to be understood as saying that he shall have no authority, after the case shall have been fixed for examination, on a proper showing, in the exercise of a sound legal discretion, to allow a continuance for any other valid cause."

State ex rel. Banking Company and National Bank vs. Auditor et al.

In the instant case, the physical inability of the most important and material witnesses on behalf of the State to appear and testify is an ample justification for a postponement of the examination to such a time as they may be able to attend the examination.

The object of giving bond for one's appearance to answer an accusation is for the purpose of securing his attendance, and it should be in such an amount as to exact the utmost vigilance on the part of the sureties for the appearance to prevent a forfeiture of the bonds. The amount of the bond should bear a proportion to the gravity of the offence and to the ability of the accused to give it. What might be excessive bail in one case would not be in another. The amount exacted by the recorder would be large, probably excessive, if the relator is without means. For a man of wealth it would probably be reasonable. At any rate, we are not informed as to the ability of the relator to furnish the bond, and are not disposed to arbitrarily fix the amount, even were we inclined, in a proceeding of this kind, to assume jurisdiction. We have often held that where relief is sought here for some ruling in the lower court, in the exercise of supervisory jurisdiction, we will not entertain the application unless all remedies have been exhausted below.

For excessive bail the injured party has a speedy remedy by simple motion before the Criminal Court which has jurisdiction of the case. It is in a position to hear testimony and to examine into the conditions which would entitle the party to a reduction of the amount fixed by the committing magistrate. *Bunting vs. Brown*, 18 Johns. 425; *Cormelines vs. Beldens*, 1 Wend. 107; 17 Mass. 116.

The relief prayed for is denied and the alternative writ herein granted set aside.

No. 11,856.

STATE EX REL. NEW ORLEANS CANAL AND BANKING COMPANY AND
LOUISIANA NATIONAL BANK VS. W. W. HEARD, STATE AUDI-
TOR, ET AL.

Executive officers of the State government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law on the ground that it contravenes the Constitution.

Laws are presumed to be and must be treated and acted upon by subordinate executive functionaries, as constitutional and legal until their unconstitutionality or illegality has been judicially established.

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State ex rel, Banking Company and National Bank vs. Auditor et al.

Under our system of government it was certainly never intended by its founders that an executive officer should nullify a law by neglecting or refusing to act under it.

A PPEAL from the Civil District Court for the Parish of Orleans.
King, J.

Branch K. Miller for Plaintiffs, Appellees.

M. J. Cunningham, Attorney General, for Defendants, Appellants.

Submitted on briefs November 7, 1895.

Opinion handed down December 16, 1895.

The opinion of the court was delivered by

WATKINS, J. Relators seek by *mandamus* to compel the respondents to comply with and perform their plain ministerial duties, which are designated in the Concurrent Resolution of the General Assembly, known as Act 182 of 1894, directing the Auditor to warrant, and the Treasurer to pay, the amounts claimed by them, out of the surplus interest fund of 1889.

Relators base their claims upon a contract made and entered into by them, with the Board of Liquidation, representing the State of Louisiana, on the 26th of December, 1886, and renewed on the 3d of June, 1888; whereby they engaged, as fiscal agents of the State, to cash and carry the coupons of all valid consolidated and constitutional bonds of the State, up to and including those falling due on the 1st of July, 1889, as specifically stipulated therein.

They aver, that under said contract, they respectively paid to the holders of interest coupons upon consolidated bonds of the State of Louisiana, which were presented to them for payment, each the sum of two thousand six hundred and sixteen dollars; which sums they are entitled to have reimbursed to them, respectively, "by their principal, the State of Louisiana, for whose benefit and account the said sums were paid."

They further aver, that there remains in the hands of the respondent State Treasurer an unexpended balance exceeding ten thousand dollars of the amount of the appropriation made by the

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general revenue act of the year 1888, being Act 48 of that year, to pay interest coupons of the State of Louisiana, which became due on the first of January and the first day of July, 1889.

That such unexpended balance is in law applicable to the reimbursement of the aforesaid sums by them paid, as fiscal agents of the State; that there is no other appropriation of said balance.

That by concurrent resolution No. 182 of the General Assembly of 1894 the respondent Auditor is directed to warrant for, and the respondent Treasurer is directed to pay them, respectively, the aforesaid sums; and in violation and disregard of their duties therein specified, said respondents have refused and declined, the one to issue his warrant and the other to make payment to them, of the aforesaid sums, as it is their plain ministerial duty to do.

Therefore relators complain, and pray for a peremptory *mandamus* to compel respondents' performance of duty.

Respondents, represented by the Attorney General, represent that the claims of relators are for the payment of certain coupons No. 31, due July, 1889, as shown by the list thereof furnished by relators to the Auditor. That said coupons were clipped from consolidated bonds which the State did not owe, which are null and void, and which should have been destroyed by the direction of the Constitution and the law, but which were fraudulently and illegally put upon the market by a former Treasurer of the State. That the bonds from which said coupons were clipped belonged, some to the Agricultural and Mechanical College and some to the Seminary fund; and some had been received in exchange for constitutional bonds. That the said bonds belonging to the Agricultural and Mechanical fund, were declared null and void after the 1st of January, 1880, and the General Assembly was prohibited from ever making any provision for payment, and was ordered to destroy the same by Art. 223 of the Constitution; that as the coupon is a part of the bond, the State does not owe it, and the Legislature is prohibited from paying it, and therefore concurrent resolution 182 of 1894 is null and void, as in violation of the Constitution, as well as Act 48 of 1888, in so far as it may be held to make appropriation to pay those invalid coupons; that the obligation of the State evidenced by those bonds was extinguished by that exchange, and neither the treasurer nor any other person had or has the legal power to revive that obligation by an illegal reissue of the bonds; that therefore the State does not

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owe said bonds or coupons, and the Legislature is without power to pay them, and respondents have no right to pay them; that the appropriation made by Act 48 of 1888 to pay interest coupons was only to pay coupons clipped from valid and legally outstanding bonds, and not from bonds illegally and fraudulently issued or put in circulation; that the surplus fund remaining in the treasury left from said appropriation after paying all valid coupons of the year must be used by the board of liquidation in buying up valid consolidated bonds, and can not be used to pay interest on fraudulent bonds; that as the State does not owe interest on these bonds the payment of these coupons would be a gratuity which the Legislature can not make; that the concurrent resolution, Act 182 of 1894, is a disguised appropriation, and the Legislature can not appropriate money by concurrent resolution; but such an appropriation as this, if within the legislative power, would have to be made by two separate bills, introduced after thirty days' proper advertisement, and passed in the regular way, and after all constitutional delays and requirements had been complied with, whereas the concurrent resolution 182 of 1894 was passed as a single resolution, without any of these formalities or delays.

On the trial the evidence showed that relators had paid and expended the sum of money claimed in satisfaction and discharge of coupons clipped from that species of bonds known as Agricultural and Mechanical College bonds in greater part, and that same were those falling due on the 1st of July, 1889, and which were duly presented to them as fiscal agents of the State of Louisiana for payment by the holders thereof in the due course of business and in pursuance of their contract with the State.

It was admitted by the Attorney General, on behalf of the respondent, that there is money enough in the interest fund of 1889, appropriated by Act 48 of 1888, to cover the amounts claimed by relators.

It is shown that due and proper demand was made of respondents for compliance with the provisions of concurrent resolution 182 of 1894 without avail.

The Attorney General introduced in evidence the joint report of the Auditor and Treasurer containing a list of consolidated and constitutional bonds as classified by the New Orleans Stock Exchange; other evidence conforming to the averments of the respondents' an-

swer—particularly, extracts from the published journals of the Senate and House of Representatives, of the session of 1894, showing the course of the legislative proceedings in the introduction and passage of House concurrent resolution No. 27, and which bears the the number 182 in the published acts of 1894. The record contains the following admission of counsel *pro* and *con*, viz.:

“It is hereby admitted that the coupons sued upon were clipped from the bonds illegally issued by the Treasurer; that they became due on July 1, 1889, and were paid on that date by the relators’ banks without any notice or knowledge that they were fraudulent, (they being) fiscal agents of the State, on date of their presentation. That similar coupons clipped from some bonds had been paid on presentation by the fiscal agents, on the first of January and July of each year, from the time they were put in circulation up to and including the coupon due 1st of July, 1889, up to that time there having been no suspicion of fraud, and all of said payments having been allowed by the Auditor and Treasurer in settlements made with the fiscal agents. That after these coupons were paid by relators, the fraudulent issue of the bonds was discovered in September, 1889, and they were not allowed credit therefor in their settlement with the Treasurer.”

The language of the concurrent resolution 182 of 1894 is as follows, viz.:

No. 182.]

CONCURRENT RESOLUTION

Authorizing and directing the Auditor to warrant for, in favor of, the Louisiana National Bank and the New Orleans Canal and Banking Company, both of the city of New Orleans, and the Treasurer to pay said banks the amount of certain interest coupons, paid by the said banks as fiscal agents of the State of Louisiana, on July 1, 1889.

WHEREAS, In the year 1889 the Louisiana National Bank and New Orleans Canal and Banking Company, both of the city of New Orleans, were fiscal agents for the State of Louisiana; and

WHEREAS, In such capacity as fiscal agents the said banks paid to the holders thereof certain interest coupons

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of certain consolidated bonds of the State of Louisiana, maturing July 1, 1889; and

WHEREAS, The bonds from which said coupons had been detached were subsequently ascertained to be the property of the State of Louisiana, and which had fraudulently been put in circulation by E. A. Burke, then Treasurer of the State of Louisiana; and

WHEREAS, There remains in the hands of the State Treasurer a balance of appropriations made by the Legislature of 1888, to pay the interest upon the consolidated bonds of the State of Louisiana;

Therefore be it resolved, by the Senate of the State of Louisiana, the House of Representatives concurring therein, That the Auditor is authorized and directed to warrant in favor of the said Louisiana National Bank for the sum of two thousand six hundred and sixteen dollars, and the said New Orleans Canal and Banking Company for the sum of two thousand six hundred and sixteen dollars, being the respective sums paid by them as fiscal agents as aforesaid, upon any unexpended balance in the hands of the State Treasurer, of the appropriation made for the payment of interest upon the consolidated bonds of the State of Louisiana, by the Legislature of 1888; and the Treasurer is hereby authorized and directed to pay said banks the said sums in the usual course.

G. W. BOLTON,

Speaker of the House of Representatives.

H. R. LOTT,

President Pro Tempore of the Senate.

On this statement of the issues raised, we have three questions for consideration, to-wit:

First. Whether it was within the competency of the Legislature to appropriate, or apply money from the State treasury, to the reimbursement of the relators' claims, for money expended in the payment of the interest coupons, taken from the consolidated bonds, of the denomination of Mechanical and Agricultural College bonds, and from constitutional bonds, which matured on the 1st of July, 1889.

Second. Whether, in fact, concurrent resolution 182 of 1894 was not an act of appropriation, in disguise, and enacted without observance of constitutional forms and legal requirement, and therefore absolutely null, and without legal effect.

Third. Whether the unexpended balance in the State treasury, resulting from the general appropriation act of 1888, can be reached and controlled by concurrent resolution 182 of 1894; or is same by law dedicated to the Board of Liquidation for the purchase of outstanding valid constitutional bonds of the State.

I.

This is not a suit against the State.

It is a *mandamus* proceeding undertaken by relators, as the *quondam* fiscal agents of the State, for the purpose of coercing the performance of an alleged ministerial duty which a concurrent resolution of the General Assembly has imposed upon the respondents as executive officers of the State government. In such a proceeding the State can not be said to have been sued. She could not be sued without special legislative permission.

In *State ex rel. McEnery vs. Nicholls*, Governor, 42 An. 209, we said that "a *mandamus* against the register of the State land office, to coerce his performance of duties purely ministerial, is not a suit against the State. *Mandamus* will go to the auditor, treasurer or register of the land office of the State, in appropriate cases."

In *State ex rel. Collens vs. Jumel*, 30 An. 863, our predecessors said:

"The State is sovereign, and can not be sued by her citizens, in her own courts, without her permission; but a civil proceeding by which one officer of the State seeks to compel another officer of the same State to perform a ministerial duty is not, in the proper sense of the words, a suit against the State.

"Nothing is more common than for a party who has a claim against the State, whether for salary as an officer, or for money due on other accounts, to have his *right* to payment adjudicated through and by means of a *mandamus* against the auditing officer.

"It is recognized by us as a legitimate mode of ascertaining what are the rights of persons who have or who prefer claims against the State." *State ex rel. Ecuyer vs. Treasurer*, 33 An. 969; *State ex rel. Campbell vs. Auditor*, 37 An. 353; *State ex rel. Mentz vs.*

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Auditor, 28 An. 47; State *ex rel.* Printing Company vs. Auditor, 28 An. 72.

Those decisions are in line with those of the Supreme Court of the United States. *Marbury vs. Madison*, 1 Cranch, 137; *Kendall vs. United States*, 12 Peters, 608; *Board of Liquidation vs. McComb*, 92 U. S. 541.

The principles announced in those decisions are in strict keeping with the relief demanded by the relators in the instant case.

Exactly the converse of the foregoing proposition is announced in State *ex rel.* Hope & Co. vs. The Board of Liquidation, 42 An. 647.

In that case we held:

“Whenever, by the Constitution and laws of a State, officers of the executive branch of the government are vested with discretionary powers and functions in the performance of civil duties or when political powers and responsibilities are devolved upon them they are not amenable to judicial process; in such case their acts are only politically examinable.”

The relators have brought themselves strictly within the principles announced in the Collins case—their demands being predicated upon claims for moneys expended for account and in pursuance of their contract with the Board of Liquidation, and their right to *mandamus* depending upon the terms of Act 182 of 1894.

In State *ex rel.* Campbell vs. Steele, Auditor, *supra*, relator asserted a claim against the State, to meet which the legislature had made an appropriation, directing its payment out of any money in the treasury not appropriated; and complained that the auditor had declined to issue his warrants on the treasury therefor—the latter denying his right to issue such warrant, and offering the relator his warrant on the *general fund*.

The court, when speaking of the legislative act, said:

“It was passed while there was enough money in the treasury to pay it, and before any appropriation of it to any other object, to prevent or impair its payment.

“The general assembly, most probably, understood the exact condition of this fund then, and employed the language used in the act to cause its application to the admitted indebtedness.

“The words of the act are entirely sufficient to accomplish this end, by charging that fund and any other fund in *existence* with a reserve for that purpose.

"The Legislature did not propose to postpone the payment of the claim. They contemplated to have it paid from any money in the treasury which had not been previously specifically destined, set apart or appropriated for another object."

While it was made the general duty of the auditor to examine, audit and settle all claims which are presented against the State, and payable out of the treasury, and to that end it is made his duty to examine all the evidence in support thereof before issuing his warrant therefor, yet the act on which relator's suit is predicated in terms declares that they respectively paid and expended the sums claimed while acting in the capacity of fiscal agents of the State, in pursuance of their respective contracts, in paying "coupons of certain consolidated bonds of the State of Louisiana maturing July 1, 1889, and that the bonds from which said coupons had been detached were subsequently ascertained to be the property of the State of Louisiana, and which had fraudulently been put in circulation by E. A. Burke, then treasurer of the State of Louisiana."

And, having made this statement of fact, the act further declares "that the auditor is hereby authorized and directed to warrant" in their favor for said sums, "upon any unexpended balance in the hands of the State treasurer of the appropriation made for the payment of interest upon the consolidated bonds of the State of Louisiana by the legislature of 1888; and the treasurer is hereby authorized and directed to pay said banks the said sums in the usual course."

So it is clear that the facts are found, and the duty is imposed by the legislature, thus dispensing the auditor from the performance of the general duty of examining the facts upon which relator's claims are founded.

In *People ex rel. Cromwell vs. Commissioners*, 36 Barbour, 177, it was held "that the courts have nothing to do with the correctness or incorrectness of the legislative opinion, and must assume the fact to be as the legislature assume or admit it to be."

In *Bank vs. Fenno*, 8 Wallace, 553, it was said that "the motive of the legislature in passing a law can not be inquired into by the courts."

Judge Cooley declares it to be the *consensus* of the best judicial opinion "that a statute is assumed to be valid until some one complains whose rights it invades. Cooley's Con. Lim., pp. 163, 188.

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In *Lusher vs. Scites*, 4 W. Va. 11, it was decided that the courts can not go into an inquiry as to the truth or falsity of facts upon which an act of the legislature is predicated.

It becomes manifest, therefore, that the *discretion* of the auditor in the premises was eliminated from the case and the purely *ministerial* function of issuing his warrant preserved. High's Ex. Lega¹ Rem., Secs. 101, 104. That, in this respect, the ministerial duty which is imposed upon the auditor is likewise imposed upon the treasurer. Now, in *State ex rel. Hommerich vs. Hunter*, treasurer, 14 An. 221, it was stated that the respondent "refused to pay the warrants on the ground amongst others that from *his construction of Act No. 143 of 1859* the money claimed by these warrants was not due" the relator; but the court held that he had no such power under the law, and said that "*the payment of the warrants was a ministerial duty imposed upon the treasurer.*" (Our italics.)

And in the course of their argument on the respondents' pretensions they said:

"Such an argument, if legitimate, would justify the interference of public officers with the peculiar functions appropriated to each, and would produce such collisions in the administration of public affairs as to materially impede the proper and necessary operations of government."

Accepting this as the true doctrine, applicable to executive officers of the State government, is it not applicable with much greater force to an attempted invasion of the prerogative of the legislature?

If an act of the legislature has, formally and in terms, declared that certain claims against the State are just and well-founded and ordered the auditor to warrant on the treasury therefor, and the treasurer to pay same can either question the authority of the general assembly or go behind the act and inquire into the *evidence* on which such claims are based or the constitutionality of the act.

Whilst, under the peculiar circumstances of the case, we entertained the charge of unconstitutionality in the act of the legislature which was raised by the secretary of state, as relator in the case of *State ex rel. Morris vs. Secretary of State*, 48 An. (at page 647), yet we safeguarded it in this way:

"We may state, as a preliminary to the discussion of the remaining issues in the return, that the right of the secretary of State to

raise such issues for judicial determination as prerequisite to granting relief by *mandamus* compelling him to *publish* the proposed amendment is *very questionable indeed*. But we are indisposed to hamper and circumscribe any remedies the respondent *thinks* himself entitled to, and will undertake the investigation of the issues raised *only* for the purpose of determining whether the alleged invalidities in the confecton of the proposed amendment, and its alleged illegal and unconstitutional features, are so *glaring* and *patent* as to furnish the secretary of State just grounds of refusal to publish it."

From the foregoing it is quite clear that this charge of unconstitutionality and illegality of an *act of the legislature* can not be regarded as a precedent justifying its application in ordinary cases like this.

In *State ex rel. Nicholls, Governor, vs. Shakspeare, Mayor*, 41 An. 156, this question arose and was expressly decided, the court holding that "laws are presumed to be constitutional until the contrary is judicially established; and they must be executed by the officers upon whom they impose the duty of doing so, who have no authority to resist the execution thereof on the ground that they contravene the constitution."

Again:

"Therefore, when the judiciary, whose duties are to pass upon the constitutionality of an act, is so careful and conservative in its deliberations before passing judgment as to its validity, it seems but reasonable to require, in a well-constituted government, obedience to it by officers who are to execute it until its constitutionality is passed upon by the judiciary."

In *Bassett vs. Barbin*, 11 An. 672, the old court said:

"It was probably in the contemplation of the legislature that the duty would be performed by the sheriff in office at the time of the promulgation of the law, but it surely was never intended that that functionary could nullify the law by neglecting or refusing to execute it."

In *State ex rel. Hall vs. Judge*, 38 An. 1222, it was held that the judge of the district court has no right to refuse leave to the district attorney to file an information on the ground that, in his opinion, the statute under which the prosecution is instituted is unconstitutional.

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tional. That it was "a matter of defence exclusively within the discretion of the accused, who can urge it in arrest of judgment."

In *Fisher vs. Steele*, Auditor, and *Burke*, Treasurer, 39 An. 447, the court, after quoting from *Cooley's Constitutional Limitations*, one of the extracts made below, said:

"That principle is suggestive of a grave doubt of the right of plaintiff in this case to assail the constitutionality of the statute under discussion," etc.

In *State ex rel. Board vs. Jumel*, Auditor, 32 An. 60, it was held that the auditor can not be compelled by a *mandamus* to levy a certain tax, even though an act of the legislature made it his express duty to do so, when it appears that his doing so would be in disregard of a final decision of the Supreme Court pronouncing the act unconstitutional and in direct contravention of a subsequent act of the legislature.

In *State ex rel. Macaulay vs. Clinton*, Auditor, 27 An. 429, it was held that in a *mandamus* proceeding, the question whether the State, by her legislation on the subject, has impaired the obligations of her contract with the relator, is a matter that can not be decided in this controversy, because the State is not a party to the suit, and the auditor has no interest in the solution of the question.

The same observation is applicable to other constitutional objections raised by the relator.

This decision, and others of its kind, is well illustrated by that in *The State vs. Judge of the Fifth Judicial District*, 5 An. 756, where the act of the legislature providing for the trial of causes in which a district judge shall be recused by the judge of an adjoining district, was alleged to be unconstitutional by the respondent, and held to be valid by the court—it being a question in which the judge had an interest, and which was a necessary issue to be disposed of. In that case the judge was called upon to test the constitutionality of the law as a matter of defence.

We have thought it advisable, owing to the great importance of the question, to go over the jurisprudence of other states, and we have examined all the cases within our reach, and have made the following extracts therefrom as the result of that examination:

In *State ex rel. Bloxam vs. Secretary of State*, 13 Fla. 55, it was held that an act of the Legislature repealing the law imposing the duty on respondent, pending trial, without saving the proceedings having

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been called to the attention of the court, the power was gone, and the proceedings must be dismissed.

In State *ex rel.* Moody *vs.* Barnes, Comptroller, 25 Fla. 298, it was said that while it is not ordinarily a case calling for *mandamus* "because respondent went out of the way to exercise his discretion on a question not properly within it, or because he gave a reason, if a wrong one, for his decision, on a question to which its discretion did not reach;" yet, "in either case, we have seen that *mandamus* has been allowed."

In State *vs.* Lafayette Co., 41 Mo. 221, the writ was granted against the county court to give relief against abuse and oppression.

In Nelson *vs.* Edwards, 55 Texas, 389, it was held that *mandamus* should go "because the commissioners went outside of their discretion in at all considering the controversy between the parties as to which of the two was entitled to the office."

In Gullick *vs.* New, 14 Indiana, 93, the writ was granted on the ground that the clerk, whose duty it was to approve sheriff's bonds, refused "because another was in the office claiming it."

The situation was the same in Case *vs.* Pritchett, 1 Spencer, 134; also in Beck *vs.* Jackson, 43 Mo. 117. In Daniel *vs.* Miller, 8 Colorado, 542, the writ went to the clerk of court, "because he refused to approve an appeal bond, on the ground that the court held that appeal did not lie." In State *ex rel.* *vs.* Lewis, 50 Ohio St. 128, the writ issued because "the officers to approve sheriff's bond refused, because, in their opinion, the bond was not presented within the time for approval required by law.

In Mobile, *etc.*, *vs.* Cleveland, 76 Ala., it was issued to the clerk because "he refused to approve an attachment bond, because the sureties were non-residents of the county—the law requiring sureties to be resident of the county," *etc.*

In State *ex rel.* Moody *vs.* Comptroller, *supra*, the court, after reviewing and analyzing many cases, said:

"These cases resting on mistake of law, it is important to observe that it was law not connected with the sufficiency of the bond, as to its form, legality and sureties; and therefore laid outside of the discretion given for the approval of bonds, * * Courts only check the exercise of discretion when assumed in regard to matters not properly within it, or when mistake is made in *law not germane* to the discussion" (p. 308).

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In *Franklin & Co. vs. State ex rel. Patten*, 20 American and English Corp. Cases 60, the Florida court say:

"Not only is it true that a court will not, as a general rule, pass upon a constitutional question, and decide a statute to be involved unless a decision upon that very point becomes necessary, but it is also a rule that a court will not listen to an objection made to the constitutionality of a statute by a party whose rights it does not affect, and who has, therefore, no interest in defeating it."

In *Jones vs. Block*, 48 Alabama, 540, the court say:

"A party who seeks to have an act of the legislature declared unconstitutional must not only show that he is or will be injured by it, but he must also show how and in what respect he is, or will be, injured and prejudiced by it." Injury will not be presumed; it "must be shown."

In *Turnpike Corp. vs. County of Norfolk*, 6 Allen 360, the Massachusetts court held that the validity of a statute can be called in question only by those having a direct interest in the rights supposed to be injuriously affected by its provisions.

In *People vs. Railroad Company*, 15 Wendell, 113, where the attorney general filed an information in the nature of a *quo warranto* to contest respondents' right to build a bridge across the Hudson river, it was held that the constitutionality of the legislative act authorizing its construction "can not be called in question by the people, but that individuals alleging themselves to be injured thereby can alone raise the question." *Smith vs. McCarthy*, 56 Penn. St. 359; *Marshall vs. Donovan*, 10 Bush. 681; *Williamson vs. Carleton*, 51 Maine, 449; *Dyarnitt vs. Mayner*, 23 Miss. 600; *State vs. Hill*, 10 Neb. 38; *Howard vs. McDearmid*, 26 Ark. 100.

In *Van Horn vs. State ex rel. Abbott*, 64 N. W. Rep. 365, the Nebraska court said:

"But the courts themselves will enforce a statute, unless it is clearly repugnant to the Constitution, and in discharging the functions of their offices ministerial officers should of course exercise the greatest caution on such questions.

"A doubt as to the validity of a statute would not justify them in disregarding it.

"The peace of the community, the orderly conduct of government, require that only in clear cases of unconstitutionality should they refuse obedience to legislative acts.

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"They always disregard those at their peril."

In *State vs. Douglass*, 18 Nebraska, 506 (26 N. W. Rep. 315), it was held that on an application for *mandamus* against county commissioners to compel them to call an election "the court would not, in that proceeding, determine whether or not the act was in contravention of the constitution." *State vs. Stephenson*, 25 N. W. Rep. 585; *State vs. Moore*, 40 Neb. 854.

In the *People ex rel. Attorney General vs. Solamon*, 54 Illinois, 89, it was held that "a ministerial officer can not be allowed to decide upon the validity of a law and thus exempt himself from responsibility for disobedience to the command of a peremptory *mandamus*, his disobedience to the law being the cause of his inability to obey the command of the court. It is the duty of a ministerial officer to obey the act of the legislature directing his action, not to question or decide upon its validity."

Again:

"To allow a ministerial officer to decide upon the validity of a law would be subversive of the great objects and purposes of government, for if one such officer may assume infallibility, all other like officers may do the same, and thus an end be put to civil government, one of whose cardinal principles is subjection to the laws."

In *Wellington vs. Petitioner*, 16 Pickering, 96, it was said by the court:

"*Prima facie* and on the face of the statute itself nothing will generally appear to show that the act is not valid, and it is only when some person attempts to resist its operation and calls in the aid of the judicial power to pronounce it void, as to him, his property or his rights, that the objection of unconstitutionality can be presented and sustained.

"Respect for the legislature, therefore, concurs with well-established principles of law in the conclusion that such an act is not void, but voidable only, and it follows as a necessary legal inference from the position, that the ground of avoidance can be taken advantage of only by those who have a right to question the validity of the act, and not by strangers." *Matter of Albany St.*, 11 Wendell, 149; *Williamson vs. Carlton*, 51 Maine, 449; *State vs. Rich*, 20 Mississippi, 393.

Cooley again declares:

"The constitutionality of a law, then, is to be presumed because

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the legislature, which was first required to pass upon the question, acting, as they must be deemed to have acted, with integrity, and with a great desire to keep within the restrictions laid by the constitution upon their action, have adjudged that it is so.

"They are a co-ordinate department of government with the judiciary, vested with very high and responsible duties, as to some of which their acts are not subject to judicial scrutiny; and they legislate under the solemnity of an official oath, which it is not to be supposed they will disregard.

"It must, therefore, be supposed that their own doubts of the constitutionality of their own action have been deliberately solved in its favor; so that the courts may, with some confidence, repose upon their conclusion, as one based upon the best judgment." Cooley Con. Lim., p. 188.

Again:

"The courts must assume that legislative discretion has been properly exercised. If evidence was required, it must be supposed that it was before the legislature when the act was passed; and, if any special finding was required to warrant the passage of the particular act, it would seem that the passage of the act itself might be held equivalent to such finding." *Ibid.*, p. 186; *Domere vs. Cogley*, 8 Blackf. 177; *Magruder vs. Magruder*, 1 Blackf. 352.

Cooley again says:

"*When a statute is adjudged to be unconstitutional it is as if it had never been.*

"Rights can not be built up under it; contracts which depend upon it for their consideration are void; it constitutes a protection to no one who has acted under it; and no one can be punished for having refused obedience to it *before the decision was made.*" *Ibid.*, p. 187.

The Judiciary are "the rightful expositors of the laws." *Bank vs. Dudley's Lessee*, 2 Peters, 492; *Dodge vs. Woolsey*, 18 Howard, 331.

In the case of *Marbury vs. Madison*, Secretary of State, 1 Cranch, 137, *mandamus* was resorted to for the purpose of compelling the respondent to deliver a commission which had been signed by the President to relator as a justice of the peace, and the principal question was as to the constitutionality of the law which imposed the duty on the respondent.

There was no discussion as to the right of the secretary to raise the question, for the question was raised by the court and they said:

"In some cases, then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?" P. 179.

In *Board of Liquidation vs. McComb*, 92 U. S. 531, Justice Bradley as the organ of the court said:

"In either case if the officer plead the authority of an unconstitutional law for the performance or violation of his duty it will not prevent the issuing of the writ of *mandamus*."

In *Huntington vs. Worthen*, 120 U. S. 97, the authority of the board of railroad commissioners to raise the question of the unconstitutionality of the law was not mooted or discussed. The court said:

"An unconstitutional act is not a law; it binds no one, and protects no one. Here the conflict between the constitution and the statute was obvious, and the board had the advice of the highest legal officer of the State; and his construction was sustained by the judgment of the Supreme Court of the State."

This was an exceptional situation.

Norton vs. Shelby County, 118 U. S. 425, was an ordinary common law action of debt, and the question of the constitutionality of a law was directly involved as a part of the case.

Poindexter vs. Greenhow, 114 U. S. 270, was an action for the recovery of personal property, and the constitutionality of the law was properly an issue.

In *Sessums vs. Botts*, 34 Texas, 335, it was held that from the date of the enactment of a law until it was adjudged unconstitutional by that court, it had the force and effect of law, so far as to protect ministerial officers in obeying its mandates; and that it is advisable for all good citizens to obey whatever the law-making power shall promulgate as law until it shall be adjudicated by the judicial tribunals not to be law.

We have not only gone over all of the foregoing cases, and examined them with care, but we have likewise examined a great many others; those not cited were found, in our opinion, inapplicable to the present controversy, because only private rights were litigated between individuals, and the constitutional questions were properly raised and decided.

State ex rel. Banking Company and National Bank vs. Auditor et al.

In *mandamus* proceedings against a public officer, involving the performance of official duty, nothing can be inquired into but the question of duty on the face of the statute, and the ministerial character of the duty he is charged to perform.

After a careful investigation of the authorities, we feel fully confirmed in the correctness of the conclusions we arrived at in *Nicholls, Governor, vs. Shakspeare, Mayor*, and other cases, to the effect that executive officers of the State government have no authority to decline the performance of purely ministerial duties which are imposed upon them by a law, on the ground that it contravenes the Constitution.

Laws are presumed to be, and must be treated and acted upon by subordinate executive functionaries as constitutional and legal, until their unconstitutionality or illegality has been judicially established, for, in all well regulated government, obedience to its laws by executive officers is absolutely essential, and of paramount importance.

Were it not so the most inextricable confusion would inevitably result, and "produce such collisions in the administration of public affairs as to materially impede the proper and necessary operations of the government."

"It was surely never intended that an executive functionary should nullify a law by neglecting or refusing to execute it."

The result of this conclusion is, that the respondents are without right to urge the unconstitutionality of the concurrent resolution which is involved.

II.

With regard to the *second* question which is presented by the return—whether, in point of fact, the concurrent resolution of 1894 was not an act of appropriation in disguise, enacted without observance of the forms of law, and therefore absolutely void and without legal effect we are of opinion that it rests upon a different footing.

The auditor is in duty bound to exercise proper watchfulness and care in the performance of his arduous and responsible duties. In dealing with legislative appropriations he must necessarily examine the laws making the same, and should his judgment suggest that any act was wholly irregular, it would be his duty to pause in issuing his warrants thereunder until its validity had been judicially ascertained. This is a part of his official duty, and this court will assume that he has acted with due circumspection and not arbitrarily or captiously.

Looking into the facts which we have detailed *supra*, we find that this contention is not well grounded, for, *inter alios*, it was admitted by the attorney general that there is money enough in the interest fund of 1889 to cover the amount claimed by the relators.

Hence the funds under consideration had been already appropriated long prior to the passage of the joint resolution of 1894, and the general assembly merely dealt with an existing surplus of the money which had been theretofore dedicated to the interest fund. In this light the legislative purpose and object were to make this surplus applicable to the claims of relators, and the concurrent resolution was the means adopted for that purpose.

In *State ex rel. Fisher vs. Steele, Auditor, and Burke, Treasurer*, 39 A. 1. 447, it was held that any balance remaining to the credit of one or more of the separate funds created by law, after the satisfaction of all the warrants drawn against the same, is the property of the State, with full power in the legislature to apply the same to any lawful purpose under the constitution.

In our opinion that decision is correct and it is conclusively against respondents' contention.

III

In view of the authorities cited and the opinion we entertain of the right of the respondents to raise the question of the constitutionality of the law, it is needless for us to examine the question of the sufficiency of the evidence on which the legislature acted. We believe it to be obligatory upon us to coerce the respondents to perform the ministerial function imposed by the concurrent resolution upon them respectively, and leave the evidence upon which they acted without comment, and the constitutionality of the law to future determination.

In so far as concerns the question of the unexpended balance resulting from the general appropriation of 1888 having been dedicated to the board of liquidation for the purpose of purchasing outstanding consolidation bonds, and consequently beyond the control of the general assembly at the time of the passage of the concurrent resolution, it is sufficient to say that we must act on the evidence in this record; and it shows by the respondents' admissions that there is sufficient money in the interest fund of 1889, appropriated by said resolution, to cover the relators' claims.

State ex rel. Banking Company and National Bank vs. Auditor et al.

Whether the board of liquidation has any prior or better claim thereto than the relators does not appear from the evidence. At all events, the board of liquidation has not been made a party and its rights can not be determined here; and they will not, of course, be interfered with by our decree.

The judgment of the court below was in favor of the relators and it is affirmed.

MILLER, J., recused.

INDEX.

ACCOMPLICE.

See Criminal Law.

ACTIONS.

In an action, *ex contractu*, for the violation of a contract no punitive damages can be assessed in the absence of bad faith. When there has been no proof of actual damages, but loss of time and inconvenience has been shown for the technical violation of the contract, compensatory damages of a nominal amount will be allowed.

Justice vs. Southern Pacific Co , p. 255.

The defendant in the partition suit, who sets up title, assumes the burden of proof of the plaintiff in the petitory action.

Remick vs. Lang, p. 914.

Under the terms of the contract, by the failure to pay one of the instalments, the other instalments not matured became due and exigible. The action was, therefore, not premature.

Vincent vs. Phillips, p. 1238.

ACT UNDER PRIVATE SIGNATURE.

An act under private signature, acknowledged, or legally held to be acknowledged, has, between those who have subscribed it and their heirs and assigns, the same credit as an authentic act.

Rouyer et als. vs. Carroll, p. 769.

ADMINISTRATION—ADMINISTRATORS—EXECUTORS.

The tutrix, who is the widow in community, who administers the succession as tutrix, and who provokes the sale of the succession property as minor's property, can not thus destroy the minor's mortgage on her undivided half of the property. Such a sale can not be assimilated to an administrator's sale to pay the debts of the succession.

ADMINISTRATION—Continued.

The minor's mortgage operates on the immovable property of the tutor during the entire tutorship.

A vendee can not be compelled to accept title to property which suggests future serious litigation.

Lyman vs. Stroudbach, p. 71.

An opposition by heirs of deceased to an account of administration is in the nature of an answer. It is not a separate suit that should have been allotted in the Civil District Court.

Having for object a recovery from a third or last community of the deceased father a sum of money due them from the first community as heirs of their deceased mother, their demand is for a settlement and not an independent claim for an entire succession in the sense of the Code.

Viewed in this light, such opposition possesses the characteristic of a personal action, which is prescribed by lapse of ten years from the date the demand of the heirs sprung into existence.

Succession of Bothick, p. 613.

A tutrix administering a succession, without opposition, has authority to stand in judgment in a suit to dissolve a sale by the resolutive condition. *Bryan vs. Atchison, 2 An. 462.*

It devolves upon the creditors to protect their rights by intervening in the suit, and they have no cause of complaint of the tutrix defendant, for not notifying them. *Tertrou vs. Comeaux, 28 An. 633.*

Vincent vs. Phillips, p. 1238.

Without an order of court the executor, although an order had been issued to sell the property to pay debts, during the year 1891 cultivated the place, although held under a lease (without attempting to dispose of the lease or obtaining order of court to continue it).

He was properly charged with the rental value of the place, as fixed in the contract of lease. The admitted value of the use of the agricultural implements was properly charged to the executor. The price at which they sold by public auction must be added to his indebtedness, and not the inventoried value.

The judgment properly charged for the use of the mules and the price; from this is deducted the small item for forage fed to the

ADMINISTRATION—Continued.

mules. The executor who fails to prove why he did not collect a twelve months' bond is responsible for the amount of the bond. An executor who does not compel an adjudicatee to comply with his bid (without good reason) is properly charged with the amount of the bid.

The executor can not question the correctness of his own approval of a claim against a succession, unless there was manifest error. Payments made by an executor without an order of court are subject to the closest scrutiny and should not be allowed unless manifestly correct.

Succession of Beeman, p. 1355.

Executors are entrusted with the duty of executing the will of the testator. On this point the court reviews *Woodward vs. Thomas*, 88 An. 238, 243, and approvingly quotes: "It is not for him (executor) to assent to the validity of acts done by decedent, unless necessary for the perfection of conditions; * * * he should give way to the heirs, who are the only persons interested."

Executors of Carroll vs. Castleman, p. 1367.

The attorney of the heir seeking to be appointed administrator is not to be paid by the succession, when the deceased has left a will appointing executors to whom, notwithstanding the opposition of the heir, letters issue. 10 Rob. 541; 27 An. 412; 36 An. 304.

Succession of Bonzano, p. 1451.

A tutrix administering a succession will be permitted to sell the realty to pay debts upon the recommendation of a family meeting, duly approved, when there is no money or other personal property which may be utilized.

The erasure of the mortgage upon property thus sold to pay the mortgage debt is valid.

Succession of Leverich, p. 1665.

See Interdiction.

ALIMONY.

In case a trial is had and a judgment rendered in a suit for divorce with which is also coupled a rule of alimony, and the record leaves it in doubt whether the issue disposed of was the question

ALIMONY—Continued.

of alimony or the merits, the purposes of justice will be best subserved by a reversal of the judgment and the remanding of the cause for a new trial.

Reddy, Wife, vs. Carroll, Husband, p. 1185.

APPEAL.

It is too late to raise objection on appeal to a decree because the judge of one of the divisions of the court rendered the decree after an allotment alleged erroneous. *Improvement Company vs. Judge*, 41 An. 567; *Buisson vs. Lazarus*, 33 An. 1425; *James vs. Meyer*, 43 An. 38; *Pironi vs. Riley*, 39 An. 302.

Johnson et al. vs. Barkely et al., p. 99.

This court will not consent to looseness in the manner of bringing up an appeal, and when such a condition occurs will not proceed to judgment in the case.

Although no motion to dismiss be made, the court will dismiss the appeal.

Succession of Short, p. 142.

On question of fact the Supreme Court will not reverse nor modify the finding of the lower court, unless for patent and manifest error.

Ayer vs. Railroad Company, p. 144.

Where, by order of court, a suspensive appeal has been allowed on appellant's furnishing bond in an amount fixed by the court, and bond has been furnished accordingly, it will not be dismissed because it can not be maintained as a suspensive appeal. Though not good as a suspensive, it stands good as a devolutive appeal.

Where a judgment which the Supreme Court has rendered (in which it has passed upon all the issues submitted to it) has become final, and its decree has been sent down to the court in which the judgment appealed from was rendered, the cause returns under the jurisdiction of the latter court for execution, subject to the revision and supervision of the Supreme Court as to that execution. The Supreme Court will not interfere with the execution, except in clear cases of oppression or injustice, or in cases of inconsistency with its own decree.

APPEAL—Continued.

When the District Court for the purposes of execution acts originally upon a question not covered by the decree of the Supreme Court which involves an amount under the appellate jurisdiction of the Supreme Court, the action of the District Court on the particular issue can not be made the subject of a detached special, separate appeal. If its action could come before the Supreme Court at all by appeal, it would have to be on a subsequent general appeal, as to which it might be considered an incident. Ordinarily the control of the Supreme Court over the execution of its final judgments would not be by appeal, but through other remedies.

Succession of Bey, p. 219.

Where an agreement had been made to bring up books in the original, the clerk's certificate regarding these books will be controlled by the agreement.

When original documents not stamped were brought up by the clerk of a court in answer to a writ of *certiorari* issued to him to complete the record, as it occasions no delay and the law may be complied with (the case has not been called), time will be allowed to affix needful stamps, and the Supreme Court will not dismiss the appeal.

Calder & Co. vs. Creditors, p. 846.

When a statement of facts for an appeal is not applied for seasonably, in this case almost a year after the rendition of the judgment, when the memory of the judge naturally, as he states, has become indistinct, the court, if it does not dismiss the appeal because of deficiencies in the statement due to the delayed application, will, at least, construe the statement liberally, so as, if possible, to sustain the judgment. C. P., Arts. 602, 603; 31 An. 856; 10 An. 180; 7 Rob. 179.

Nicholls vs. Bienvenue et als., p. 356.

Where missing evidence would not show the fact of the seizure and circumstances connected therewith more conclusively than the judicial admissions made, and when the missing evidence would be cumulative and does not affect the decision, the appeal will not be dismissed on the suggestion of the diminution of the record.

Hebert vs. Mayer and Sheriff, p. 563.

APPEAL—Continued.

The order of appeal granted was the court's order, and if erroneous, the error was not imputable to the appellants. The order as granted by the court was made under Sec. 4 of Act No. 45 of 1870, E. S., authorizing the District Judge to make a change in the return "day" under certain circumstances. The appeal was made returnable at New Orleans on the second Monday of January, 1895, and the transcript was filed at that place at that date. Before that date sessions of the Supreme Court at Opelousas were abolished, and all appeals were made returnable at New Orleans by Acts Nos. 12 and 69 of 1894. The transcript was properly filed at that place. An erroneous designation by the District Court of the place where an appeal shall be returned does not vitiate the order and authorize a dismissal of an appeal, if the record be filed at the proper place within the time legally fixed by the court. The places at which appeals in civil cases are returnable are fixed by the law itself.

Banking Co. vs. Lumber Co., p. 581.

Where defendant in a suit reconvened against plaintiff for an amount within the appellate jurisdiction of the Supreme Court, and its reconventional demand having been rejected, it appealed to that court, its appeal did not carry with it for review to that tribunal the judgment which plaintiff in the suit had obtained against defendant, and which, in itself, was below the limit of its jurisdiction. On such an appeal the issues determined by the judgment on the original demand must be held closed in ascertaining the rights of parties, and to have been correctly rendered.

Id., p. 582.

When the sole question is one of fact, as, was the defendant amenable to a fine for the failure of the railroad company to comply with the terms of the city ordinance? an appeal from a fine imposed by a recorder's court will be dismissed.

State vs. Marshall, p. 647.

A judgment of non-suit is appealable as a final judgment.

Railroad Co. vs. Sheriff, p. 706.

It is no ground for the dismissal of an appeal that the bond does not set out the residence of the surety. This is a matter for the

APPEAL—Continued.

consideration of the court granting the appeal. It is not necessary in an appeal bond to state that the surety will be responsible in default of the principal. This legal obligation he incurs by signing the bond.

Northrup vs. Sullivan et al., p. 715.

An intervenor claiming property seized under the writ of provisional seizure, and releasing the property under a bond to produce it, if decreed liable to the seizing creditor, is entitled to appeal to the Circuit Court of Appeals from the judgment of the District Court against him for an amount within the jurisdiction of the Court of Appeals, rendered on a rule to distribute proceeds to which he makes no claim and derived from the sheriff's sale of property other than that claimed by him; in such case the test of jurisdiction on the appeal is not the amount of the proceeds, but the amount of the judgment against the intervenor. Constitution, Art. 95, as amended by constitutional amendment of 1882; Revised Statutes, Sec. 2914; *Jennings vs. McConnico*, 25 An. 651.

State ex rel. Scooler vs. Court of Appeals, p. 740.

Where a testamentary executor files his final account and tableau of distribution, and asks that the funds be distributed and the instituted heirs be placed in possession of the property bequeathed to them, an appeal from a judgment thereon which only orders the funds distributed will be sustained. When subsequently a petition is filed by the testamentary executor alleging the succession to be still under administration and praying for a judgment putting the heirs in possession, which is rendered, an appeal from such a judgment by same parties who took the first appeal will be sustained. The judgments are distinct and on separate matters.

Succession of Conder, p. 810.

When the pleadings do not show an amount of appealable interest, to determine the amount in dispute, affidavits relative thereto will be received.

Oil Co. vs. Mayor, p. 863.

A reasonable doubt as to the jurisdiction of the appellate court should be resolved in favor of an appeal; so when the petition

APPEAL—Continued.

avers a money demand within the appellate jurisdiction, the appeal should be maintained, unless the demand be manifestly fictitious. 16 La. 182; 3 Rob. 143; 4 An. 213; 6 Rob. 151.

State ex rel. Meaux vs. Judges, p. 950.

When an extension of time has been granted to file the transcript, and the return day fixed, no days of grace are allowed.

For informalities or irregularities in bringing up the appeal, the motion to dismiss must be filed within three days after the transcript has been filed; but for a failure to file the transcript, which presumes an abandonment of the appeal, the motion can be filed at any time after the filing of the transcript.

Hudson vs. Sheriff, p. 1534.

A case will be remanded, in order that the third person, who has petitioned for an appeal, may prove the amount of the indebtedness of the defendant, and whether the succession, represented by the defendant, is solvent or insolvent.

Vincent vs. Philips, p. 1216.

A remittitur by defendant of part of his claim in reconvention, after the verdict has been rendered, does not prejudice the appellant's right of appeal.

Railroad Co. vs. McNeely, p. 1298.

It appearing that since the appeal was obtained, and the transcript lodged in this court, the appellants became adjudicatees of the judgment appealed from at a public auction sale, said fact operates, necessarily, as an acquiescence in the judgment, and will result in the dismissal of the appeal.

Parker, Administrator, vs. Bilgery et als., p. 1348.

An appeal from an order of seizure and sale, and an injunction against it, having been argued and submitted to this court contemporaneously, and the injunction suit having been decided, this court will take notice of these proceedings, and *ex proprio motu*, abate the appeal.

Land and Mortgage Company vs. Heirs of Williams, p. 1380.

APPEAL—Continued.

It is a good ground for dismissing an appeal, that the transcript has been filed before the expiration of the delay for answering the appeal. The appellee is only entitled to the delay in order to answer.

A bond that is good for a suspensive appeal is sufficient for a devolutive appeal.

It is the duty of the appellant to furnish a complete transcript. If a part of the record is not in the transcript, and such part is essential to decide the case, and the applicant makes no effort by *certiorari* to complete the transcript, after his attention has been called to the omission by a motion to dismiss, the appeal will be dismissed.

Bank vs. Lumber Co., p. 1482.

See Supreme Court.

APPOINTMENTS.

See Office.

ARBITRATION.

Under an agreement to submit differences to arbitration under a penalty stipulated to be paid by the party who refuses to abide by the arbitration, such party must pay the penalty in order to sue to annul the award. C. C., Arts. 3106, 3180.

Brown vs. Stubbs, p. 1480.

ASSESSMENT.

When there is a title of record in the archives of a parish it is no part of the assessor's official duty to call in question the verity of that title and go back to a former title. *Prescott vs. Payne*, 44 An. 656.

Williams vs. Landry et al., p. 5.

While under the decision in *Prescott vs. Payne*, 44 An. 650, an assessor may not be called on to ascertain whether proceedings which culminated in a forced sale of the property of a person holding by recorded title be affected by nullities of a character such as to cause ownership not to shift, he is not authorized to substitute for the actual owner's title that of a person not holding under the prior title and in privity with it, but claiming under and through a later, distinct, independent adverse title.

Lockhart Smith, p. 121.

ASSESSMENT—Continued.

The assessment of property for taxation should conform substantially, at least, to the titles giving accurate descriptions of the property of record, and to the other requisites of assessments pointed out by law. Revenue Act No. 85 of 1888, Secs. 7, 8.

The court again affirms that a valid assessment is requisite to sustain the tax sale, and the principle is applied in this case to the defective descriptions of the property assessed. Cooley on Taxation, Chap. 12, p. 275, and the line of cases on deficient descriptions.

Land and Improvement Co. vs. Succession of Fasnacht, p. 1294.

See Tax Sales.

ATTACHMENT.

The proof not disclosing an intention on the part of the defendants either to defraud their creditors or to give an unfair preference to some of them, the judge of the District Court was authorized to dissolve the attachment. *Palmer vs. Hightower*, p. 17.

Mention in the caption of a writ of attachment of an improper judicial district, in one of the country parishes of the State, is not such a radical error as will authorize the dissolution of the writ on the motion of defendant.

Cotton Seed Oil Company vs. Mathison, p. 710.

Allegations in a petition and an affidavit for an attachment are admissible only in evidence, but not conclusive in favor of one not a party to the suit, hence such allegations are open to explanation and correction by proof of error. 1 Greenleaf, Secs. 204, 206, 209, 212; 1 Rice on Evidence, pp. 446, 447; Mallard vs. Armistead, 6 An. 897.

Least of all, can such allegations or affidavit give rise to any estoppel unless the basis of some advantage obtained to the prejudice of another, or unless another has changed his position or acted on such allegations or affidavit. 1 Greenleaf on Evidence, Secs. 204, 206, 207, 209, 212.

Lachman & Jacobi vs. Block & Bro. et al., p. 506.

Where an attachment on a just debt has been obtained against a debtor, which is maintained and a final judgment rendered for

ATTACHMENT—Continued.

the amount demanded, creditors who were not parties to the litigation, on discovering that the attachment was fraudulently and collusively obtained by an agreement between the creditor and debtor, can not have the final judgment set aside solely on the ground of collusion in obtaining the attachment, as this assertion could only serve to dissolve the attachment, which could not prevent the final judgment on the amount demanded.

Henry Shoe Company vs. Commission Company, p. 860.

In a suit by a creditor to annul an attachment against his debtor by a prior attaching creditor, he is restricted to the proof of fraud and collusion between the attaching creditor and the debtor.

Clafin & Co. vs. Benjamin et al., p. 1447.

See Privileges.

ATTORNEYS AT LAW.

The mere affirmation of a reputable attorney that he is the retained counsel in a cause has the sanctity of an oath. They, the attorneys at law, are the officers of the court, whose principal duty is to be true to the court and their client.

The record and the allegations of counsel import absolute verity as respects the authority to represent their clients.

Heirs of Brigot vs. Brigot, p. 1309.

An attorney at law with whom a deposit has been made for costs of suit is responsible in damages to his client if he permits the claim placed in his hands for suit to prescribe.

King vs. Fourchy, p. 354.

BAIL.

The object of giving bond for one's appearance to answer an accusation is for the purpose of securing his attendance, and it should be in such an amount as to exact the utmost vigilance on the part of the sureties for the appearance to prevent a forfeiture of the bonds. The amount of the bond should bear a proportion to the gravity of the offence and to the ability of the accused to give it. What might be excessive bail in one case would not be in another. The amount exacted by the recorder would be large, probably excessive, if the relator is without means. For

BAIL—Continued.

a man of wealth it would probably be reasonable. At any rate, we are not informed as to the ability of the relator to furnish the bond, and are not disposed to arbitrarily fix the amount, even were we inclined, in a proceeding of this kind, to assume jurisdiction. We have often held that where relief is sought here for some ruling in the lower court, in the exercise of a supervisory jurisdiction, we will not entertain the application unless all remedies have been exhausted below.

For excessive bail the injured party has a speedy remedy by simple motion before the Criminal Court which has jurisdiction of the case. It is in a position to hear testimony and to examine into the conditions which would entitle the party to a reduction of the amount fixed by the committing magistrate. *Bunting vs. Brown*, 18 Johns. 425; *Cormelines vs. Beldens*, 1 Wend. 107; 17 Mass. 116.

State ex rel. Millett vs. Recorder, p. 1679.

BOARD OF PARDONS.

Article 65 of the Constitution has reference to the present incumbent of the court, and he has authority by said article to sit with the Board of Pardons to hear and determine applications for executive clemency. It does not refer to the judge who presided at the trial, as he is no longer presiding judge of the court before which conviction was had.

State ex rel. Gibson vs. Judge, p. 154.

BOUNDARIES.

Owners are not bound by a consent regarding boundaries, fixed by themselves in error; without having left the matter to experts. *Gray vs. Couvillon*, 12 An. 780, 782.

Gaude vs. Williams, p. 1329.

BOUNTY.

See Government.

BROKERS' COMMISSIONS.

The charge of an amount for margin is not proof of payment of amount due in a separate and independent matter not at all connected with the usual business between the plaintiff and defendants. Shares in bank and other stock, which the broker fails to show he can control, and which he fails to offer to de-

BROKERS' COMMISSIONS—Continued.

liver at the time of the trial, can not be charged to the principal as so much due by him, nor can he be charged with amounts and commissions the brokers testify are due to them for advances made for their purchase.

Muller vs. Legendre, p. 1017.

BUILDING CONTRACTS.

Notwithstanding the stipulation in a building contract, that builders shall not be entitled to demand and receive the final balance due them on the contract price until they shall first procure from the architects in charge of the work a certificate that the edifice has been completed according to contract and accepted by said architects, the builders may sue the owners for the balance due, after having put the architects in default by demanding certificates from them, after the completion of the work—their only objection being that the full amount due the subcontractors and material men had not been paid, although same had been provided for by the builders, to be paid out of the amount due.

When the building contract provides that in case of delay in the completion of the structure by a certain fixed date, the builder shall pay a forfeit of a certain sum daily during the period of default, other provisions of the contract must be examined and compared, in order to determine upon whom—from the general tenor and provisions of the contract—the fault is imposed in causing the delay in the completion of the building.

When those other provisions disclose that the builders are to furnish the materials and perform the work, and the architects are to furnish the plans and specifications and superintend the work, it is an easy matter to show by evidence whether the delay in the completion of the work was caused by the fault of the builders or the architects, and judgment will go accordingly.

Mahoney & Co. vs. St. Paul's Church, p. 1064.

CARRIERS BY WATER—Responsibility.

The limited liability legislation under certain modifications exempts carriers by water from responsibility from losses due to perils of navigation or any want of care in the management of vessels and incurred without the privity or negligence of the carrier, but

CARRIERS BY WATER—Continued.

extends no protection against a loss caused by the contact of the vessel with the pile structure placed by the carrier in navigable waters without due precautions to guard against accidents. Revised Statutes of the United States, Sec. 4282 *et seq.*; 24 Statutes, 81; 27 Statutes, 445.

Darrall vs. Railroad Co., p. 1456.

Nor does the Code or any stipulation in the bill of lading furnish the carrier any protection against such losses. Civil Code, Arts. 2751, 2794; Wheeler on Carriers, Sec. 31 *et seq.*; 17 Wallace, 361.

Id., p. 1456.

CERTIORARI.

No badge of nullity being exhibited on the proceedings the restraining order must be dissolved, and relief by *certiorari* denied.

State ex rel. Liggins vs. Judge, p. 1022.

The petition of the relator, annexed record and return of the respondent, disclosing that the judicial proceedings complained of are regular in form, and apparently valid, relief by *certiorari* will be refused.

State ex rel. Manning vs. Judge, p. 1085.

The respondent judge having, in an *ex parte* order, annulled an inventory, because the officiating notary had failed to give notice to a presumptive minor heir to be present at the time and place of taking same, assigns as his reason for so doing that the minor was without a tutor, and he deemed it necessary for the protection of her rights: Held, there was no such excess of power or grave irregularity exhibited as would justify relief by *certiorari*.

State ex rel. McCune, Testamentary Executor, vs. Judge, p. 1512.

The court again affirms that applications for writs of prohibition and *certiorari* under Art. 90 of the Constitution will not be entertained, unless the appropriate method to obtain relief is first resorted to in the lower court.

State ex rel. Romero vs. Judge, p. 1600.

See Supreme Court.

CITATION.

Defendants can not be considered bound by a citation not addressed to them, nor to their curator *ad hoc* as their legal representative in the suit.

Belard & Johnson vs. Gebelin & Duggan, p. 186.

Any service which would be sufficient, as against a domestic corporation, may be authorized by the statute of a State to commence an action against a foreign or non-resident corporation. It may, accordingly, be made upon the president of a foreign corporation during the time he may be temporarily abiding within the jurisdiction of the court when the suit is brought.

A judgment rendered in an action thus commenced against a foreign corporation will be valid and can be enforced against any property at any time found within the State.

Graveley vs. Ice Machine Co., p. 389.

CITIZENS BANK.

Legislative Act 100, in so far as it relates to the Citizens Bank, has not the effect of a contract, and does not secure the shareholders from future "calls."

The remedy of the plaintiff bank is not limited to the seizure and sale of the bank shares.

The mortgage stockholders of the Citizens Bank are not (in person) sureties for the bonds issued by the State of Louisiana in aid of the bank. The securities held by the bank were given in pledge by the bank as security for the debt. The ownership of these securities was retained by the bank.

If an extension of time has been given to the bank or the State, or a discharge, it does not have the effect of discharging the shareholders who are indebted to the bank, and who are securities on values deposited as security.

Whether the Legislature created two corporations or one has no bearing upon the issues so far as relates to the shareholders who have bound themselves to pay the amount of their subscription.

Under the circumstances it will not be assumed that the cash stockholders who are not parties to the suit should also pay the call, despite the fact that they have paid their shares in full.

The hearing as to them must be contradictory.

CITIZENS BANK—Continued.

The "calls" made on the shareholders are personal obligations, and not subject to a prescription of less than ten years.

Citizens Bank vs. Heirs of Gay, p. 551.

The Act 246 of 1858, authorizing the directors of the Citizens Bank to transfer or set apart a stated number of shares of stock as cash shares, did not have the effect *pro tanto* of discharging the mortgage indebtedness.

That act declares that the contribution due on the cash shares, comprising the capital stock, shall remain as heretofore, payable by each of the mortgage stockholders respectively.

The shareholder had not paid anything upon the shares; he was, on the contrary, indebted for them. The statute authorized the reduction of the number of shares of the mortgage shareholders, by converting certain shares to cash shares.

The indebtedness of the mortgage shareholder remained the same, and he was required to pay the same "calls" as he would have had to pay if his shares had not been thus converted into cash shares.

The rule would not apply if the shareholder had paid his stock in full or in part.

Breard vs. Bank, p. 1874.

CITY OF MONROE.

The provisions of Act 76 of 1884, in terms, repeal the provisions of the statutes of 1871, 1873 and 1876, which grant and amend the charter of the city of Monroe, in the parish of Ouachita, in so far as they confer any exclusive authority in said city over the sale or prohibition of the sale of intoxicating liquors.

Garrett, Blanks et al., vs. Mayor et al., p. 618.

COMMUNITY OF ACQUETS AND GAINS.

The fact of a recordation of a special mortgage executed by the surviving member of the community, on community property, to secure his separate debt, can not have the effect of preventing the sale of the property, to satisfy a judgment against the community, because the price bid for it is not sufficient to pay the special mortgage. In such a case the judgment has priority, not by the fact of prior recordation, but because of the nature of the debt.

Healey vs. Ashley, p. 636.

COMMUNITY OF ACQUETS AND GAINS—Continued.

The separation of property obtained by the wife dissolves the community; her renunciation of it is presumed unless she accepts; and the acceptance must be within the time allowed the wife divorced, or separated from bed and board. Civil Code, Arts. 2406, 2410, 2413, 2414, 2420, 2430, 2431, 2438; Nap. Code, 1452, 1453, 1463; 22 Laurent, p. 383, par. 377; 8 Mourlon, p. 92, par. 217; 8 Duranton, p. 219, par. 450; 12 An. 76; 23 An. 590; 29 An. 719.

Inchoate purchases before marriage consummated after excluded from the community are those in which the obligation of the purchasing spouse to buy and pay the price is perfected before the marriage. 17 La. 238; 5 An. 213.

Heffner et als. vs. Administrator, p. 656.

The survivor in community might part with his interest in a judgment, an asset of the community, but he could not part with nor transfer that other interest in the judgment to which the heirs had a right by inheritance.

Executors of Carroll vs. Castleman, p. 1367.

COMMITTING MAGISTRATE—Preliminary Examination.

It is an imperative requirement that the examination by a committing magistrate must be taken as soon as the circumstances of the case will permit. But in the exercise of a sound discretion he may postpone the examination, if the witnesses, important and material for the State, are in no physical condition to attend the examination.

State ex rel. Milliet vs. Recorder, p. 1677.

CONSPIRACY.

The intentional causing of loss by one man to another without justifiable cause, and with malicious purpose to inflict it, is of itself a wrong, and it is a general principle that every act of man which causes damage to another obliges him by whose fault it happened to repair it.

While it may be conceded that a person has an absolute right to refuse to have business relations with any person whomsoever, whether the refusal be based upon reason, or be the result of whim, caprice, prejudice or malice, and that there is no law which

CONSPIRACY—Continued.

could reach him for so doing, it is not equally true that he can always, from such motives, influence another person to do the same without incurring legal liability.

Graham vs. R. R. Co. et. al., p. 214.

CONSTITUTIONAL LAW.

An ordinance of the council prohibiting the stabling of more than two horses, except by those obtaining permission of the council, is unequal in its operation, and hence void, because repugnant to the Fourteenth Amendment of the Constitution of the United States. 118 U. S. 356; 43 An. 496.

State vs. Kuntz, p. 106.

The nineteenth paragraph of the eighth section of Act 150 of 1890, which imposes a license tax upon every person who shall engage in the business or avocation of operating one or more towboats, to be graduated according to the gross annual receipts of said business, is illegal, unconstitutional, null and void, because it is in conflict with and contrary to the provisions of the third clause of the eighth section of Art. 1 of the United States Constitution, familiarly known as the commerce clause; it appearing that the defendant was operating his boats under a license or permit from the United States Government, and that his towboats were engaged in traversing the waters of the Bayou Teche, and the Atchafalaya and Mississippi rivers and their tributaries, and in operating between different States.

Frere, Tax Collector, vs. Von Schoeler, p. 324.

It was not in contemplation of the framers of the Constitution in declaring in Art. 20th of that instrument, that the taxing power may be exercised by the General Assembly for State purposes, and by parishes and municipal corporations, under authority granted to them by the General Assembly for parish and municipal purposes, that the General Assembly should authorize or direct the parochial authorities to exercise their taxing power for municipal purposes; on the contrary, it was intended that the taxing power of the State, that of the parishes and that of the municipal corporations, should be kept separate and distinct.

CONSTITUTIONAL LAW—Continued.

An act of the General Assembly directing parish authorities to turn over to the towns situated within their borders a portion of the licenses levied and imposed by them for parish purposes is unconstitutional.

State ex rel. Town of Mansfield vs. Police Jury, p. 1244.

Laws are presumed to be and must be treated and acted upon by subordinate executive functionaries as constitutional and legal until their unconstitutionality or illegality has been judicially established.

State ex rel. Banking Company vs. Auditor, p. 1680.

CONTEMPT OF COURT.

It is not imprisonment for debt, when the court orders payment of an amount, acknowledged to be in possession of the defendant and under the control of the court, and on failure to do so commit the defendant for contempt of its authority.

State ex rel. Audibert vs. Civil Sheriff, p. 334.

The law—Code of Practice, Art. 308—means by punishment for contempt, punishment for the offence at the outset, to prevent its repetition; and punishment afterward for the repetition of the offence.

If the contempt is permitted to endure for a period of days, or weeks, or months, it does not seem consistent with the law to punish for that period of disobedience by as many sentences of ten days' imprisonment as there are days, or weeks, or hours in the period. No such theory of the power to punish for contempt can be admitted under the law.

State ex rel. Schoenhausen vs. Judge, p. 701.

CONTRA BONOS MORES.

A railroad corporation is a *quasi* public agent, and it is its duty, independent of any agreement to secure an advantage to the corporation, to establish its stations most convenient for the public interests. An agreement, therefore, by the corporation for a part of the land to establish its depots and hotels at particular points is illegal. 18 Pick. 472, 481-8; 60 Ill. 188; 64 Ill. 414; 45 Mo. 414; 18 So. Rep. 103.

Heirs of Burney vs. Ludeling et als., p. 74.

CONTRA BONOS MORES—Continued.

All agreements which tend to injure the public service are illegal. Any agreement, therefore, which contemplates the use of private influence to secure some desired legislation is null and void. 16 How. 314, 334; 21 Wall. 441; 40 N. Y. 543.

Heirs of Burney vs. Ludeling et als., p. 74.

CONTRACT.

When a person claims employment for one year under a contract and fails to make out his case, this court will not award judgment, by way of remuneration, for services rendered for a portion of time embraced within the year of the alleged contract.

Burton vs. Behan & Zuberbier, p. 117.

Where there is an acknowledged inability on the part of the defendant to execute the contracts, the putting of him in default is not necessary as a prerequisite to a suit for damages for a violation of the contract.

Under a claim for damages under Art. 1934, O. C., the damage must be the natural and proximate result of the wrong. It must not be remote or consequential, but the natural consequence. Vague and indefinite results, remote and consequential, etc., and thus uncertain, are not embraced in the compensation given by damages.

Dwyer Bros. vs. Administrators, p. 1232.

A party who performs services under a special contract can not sue for services on a *quantum meruit*.

If a servant does extra service, not strictly with the line of his duties, and receives his wages under a special contract for said service, and makes no claim for these extra services, it is too late for him to set them up against the succession of his employer.

Succession of Jackson, p. 1089.

CORPORATIONS.

The error of the defendant company, acting at the time in good faith, in expelling a member upon a state of facts different from that afterward developed on a trial before the District Court, is not ground for damages.

The charges against plaintiff were sufficient, upon being proven, to warrant the expulsion.

CORPORATIONS—Continued.

The plaintiff, upon becoming a member, had agreed upon the manner of the proceeding in case an accusation was lodged against him. The defendant company having jurisdiction of the charge, and being under its charter and by-laws the arbitrator between the plaintiff and his accusers, the error, being one of judgment of the members, is not actionable for damages.

Durel vs. Fire Co., p. 1101.

Though the shares of a corporation after its creation may be held by a less number of shareholders than that which the law would have required as a condition precedent to the organization of the same corporation, the corporation continues to exist.

Neither the want of officers by reason of failure to elect, or by death, nor the burning of the mill which it was the object of a corporation to carry on, will of themselves work a dissolution of the corporation.

The connection of an officer of a corporation with it is one of personal trust and terminates at his death. The property of the corporation which he had in his possession or custody as such officer does not pass at his death into the possession of and under the control and administration of his administrator. The stockholders have the right to insist that corporate property should be placed in the hands and under the control of corporate agencies.

Where the necessary offices of a corporation having all become vacated by the centring of its stock in the hands of two owners, and by the death of the owner of the majority of the stock, who at the time of his death held the principal office of the company, the administrator of this stockholder, as such, takes possession of all the corporate property and takes no step looking to a replacement of officers, the remaining stockholder has the right to take judicial action looking to the appointment of a receiver by the court. If upon the trial of a demand for such an appointment it should be shown that corporate officers could not be replaced through corporate agencies either by reason of the unwillingness or inability of the stockholders to do so, the court would be authorized itself to appoint a receiver. It would not follow that a third person should be selected as such receiver, nor that the representatives of the deceased stockholder would

CORPORATIONS—*Continued.*

be deprived of the legitimate influence which they should have in the selection as holders of stock.

Belton, Praying for Receiver, p. 1614.

COURTS—Jurisdiction.

The plaintiff in the revocatory action joining several defendants, alleged to have combined with their debtor to obtain an unlawful preference, may file their petition in the Civil District Court, and are not obliged to file the petition in each of the divisions in which the defendants are seeking, by means of attachments claimed to be collusive, to obtain the preference.

But the debtors must be made defendants if the debt of the plaintiffs is not liquidated by a judgment, and the judgment must be alleged.

The Civil District Court, comprised of *five divisions*, is still one court.

Block & Sons vs. Marks et al., p. 107.

When the District Court for the purposes of execution acts originally upon a question not covered by the decree of the Supreme Court which involves an amount under the appellate jurisdiction of the Supreme Court, the action of the District Court on the particular issue can not be made the subject of a detached special, separate appeal. If its action could come before the Supreme Court at all by appeal, it would have to be on a subsequent general appeal, to which it might be considered an incident. Ordinarily the control of the Supreme Court over the execution of its final judgments would not be by appeal, but through other remedies. *Lovelace vs. Taylor, 6 Rob. 93.*

Succession of Bey, p. 220.

CRIMINAL LAW.

In criminal cases objections to testimony on the ground of irrelevancy will not be sustained by this court, unless well advised, through bills of exceptions, of all the details of the case upon which the District Judge has ruled.

State vs. Dixon, p. 1.

Evidence of previous threats is inadmissible in evidence when no overt act of the deceased against the accused has been established.

CRIMINAL LAW—Continued.

Threats alone do not constitute an overt act.

State vs. King, p. 28.

The trial judge had authority to excuse a juror, before he had been sworn, on account of the condition of his health.

This court acts upon the statement of the judge, whose signature imparts force to the bill.

Proof that the defendant had been admitted to bail was irrelevant and properly excluded.

The question was not necessarily leading, and therefore not ground sufficient to annul the verdict.

The testimony sought to be elicited by the question was in rebuttal, and therefore permissible.

Although the witness did not remember all that was said by defendant in his confession, his testimony was admissible.

When no objection was interposed to the admissibility of the evidence, proof of the fact that no improper influence was brought to bear on the accused is not an essential prior to the proof of the confession.

State vs. Madison, p. 30.

The motion in arrest on the ground that the subject of the larceny is immovable property will not be sustained when the indictment by which the motion is to be tested charges the larceny of personal property: bee hives.

The verdict in a criminal case will not be set aside because one of the witnesses remained in court after the order for the separation of witnesses, the witness, it appears, not understanding English, nor intended, as the trial judge states, to be embraced in the order, and there being no possible prejudice to the prisoner from the witness not leaving the court room.

State vs. Ducote, p. 46.

The court will not dismiss an appeal in a criminal case, the accused represented only by counsel assigned by the lower court, merely because of the delay of the clerk in forwarding the record, it being his duty to prepare and transmit to this court the record of appeal. Act No. 30 of 1878.

This court affirms the weight due to the rulings of the trial judge on application for continuance, and that such rulings will not be

CRIMINAL LAW—*Continued.*

disturbed unless manifestly erroneous. 33 An. 1112; 33 An. 681; 37 An. 786.

State vs. Bevell et al., p. 48.

Assuming that in a capital case counsel for accused would be authorized to admit the fact of death, he could not control the course of the prosecuting attorney nor the evidence the State should introduce.

Relief through motion in arrest of judgment is confined to matters appearing on the face of the record.

State vs. Valsin, p. 115.

An indictment under Act 44 of 1890 which alleges a club as the dangerous weapon used, proof that a pistol was so employed will not sustain a conviction.

State vs. Braxton et als., p. 158.

The member of a posse that expends three days in a search for the accused, extended to another parish, manifests a laudable zeal for his apprehension, but such service in our view disqualifies that member from serving on the jury to try the accused.

State vs. Defoe et als., p. 193.

The admissions of the accused will not be excluded merely because the witness testifying to it states that he can not recollect all that was said by the accused, there having been no interruption of the admission, and nothing to indicate it was subject to any qualification.

The statement of the accused that he would shoot the deceased, quickly followed by the killing, is admissible as part of the *res gestæ*. Greenleaf on Evidence, Sec. 308.

Threats of the deceased, or his dangerous character, can not be proved by the accused indicted for murder unless in aid of self-defence, after an attack or demonstration by the deceased, menacing the life of the accused, is first proved; and whether such overt act was proved the court must determine from the bill and the qualifying statement of the trial judge. Constitution, Art. 81; 36 An. 158; 37 An. 862, 443.

Applications for new trials in criminal cases must rest largely in the discretion of the trial judge, and unless the bill shows

CRIMINAL LAW—Continued.

clearly the requisite basis for the application the ruling of the trial judge will not be disturbed.

State vs. Vallery, p. 182.

Act No. 8 of the extra session of 1870, relative to crimes and offences, does not violate, and is not in conflict with Art. 114 of the Constitution of 1868, which provides that "Every law shall express its object or objects in its title."

State vs. Breeden et als., p. 374.

It suffices that the defendant was in the custody of the sheriff on the date his appeal is made returnable to this court; the fact of his having previously broken jail being fully answered thereby.

It is not a good objection to an information that it was filed during the pendency of an indictment, under which the defendant was being prosecuted at the time for the same offence.

That there is pending an information or indictment against the defendant for the same offence is no bar to another prosecution under a different indictment or information. There may be several indictments or informations pending in the same court, for the same offence, and against the same defendant. But one conviction or acquittal can be had. Nothing else operates as a bar to further prosecution.

The provision of the Constitution which declares that prosecutions shall be by indictment or information is nothing more than permission to the State to prosecute by either mode at her option, unless she is restrained by statute. And the Constitution permitting either mode of prosecution, the case must stand just in the same attitude in which it would have stood before the lower court, had there been two indictments or two informations against the defendant.

State vs. Stewart, p. 410.

Proof of the character of the deceased, and of threats communicated to the accused, is inadmissible until satisfactory basis has been laid by proof of an overt act committed by the deceased; and, in order to constitute an act overt it must consist of a hostile demonstration of such a character as to impress upon the accused the imminency of the danger of loss of life or of great bodily harm.

CRIMINAL LAW—Continued.

Under Sec. 992, R. S., the service of a copy of the indictment must be made on the accused by delivering the same to him.

Domiciliary service is insufficient.

Watkins, J., Dissenting.—Personal service upon the accused of copy of indictment not necessary.

Id., p. 411.

Intent is an essential element of the crime of embezzlement charged against an agent or attorney.

If it be shown by the evidence that the defendant believed that his client had consented that he might use the money which had been entrusted to him as a loan on interest, notwithstanding his belief was erroneous, the subsequent appropriation by the defendant did not constitute a wrongful and felonious appropriation in the sense of our statute denouncing the crime of embezzlement against an attorney.

State vs. Smith, p. 432.

The circumstance of an accomplice having told the truth about irrelevant and immaterial things, which have no tendency to confirm the material facts of his testimony involving the guilt of the accused, is not admissible in evidence for the purpose of sustaining the veracity of such accomplice, notwithstanding a further basis has been laid for his impeachment.

When a criminal statute contains separate and distinct denunciations against two separate and distinct classes of offenders, in the alternative, in one continuous and unbroken sentence, such statute must receive such construction as to give effect to all of its provisions in the sense evidently intended by the Legislature in its enactment.

McEnery, J., Concurring.—The trial judge's statement is that the veracity of the witness had been attacked, and the testimony was admitted to sustain his veracity. If so, the only way of sustaining it was by proof affecting his character for truth and veracity, and the examination must be confined to the witness' general reputation for truth and veracity. *Wh. Crim. Laws*, Sec. 814.

Miller, J., Concurring.—The testimony offered to corroborate proving nothing in respect to the guilt of the accused, advances in no

CRIMINAL LAW—Continued.

respect the solution of the issue of guilt * * * The act of 1890 is applicable to the offence charged.

Breaux, J., Dissenting; Nicholls, C. J., Concurring in Dissent.—The Constitution of 1879 has applied the principle that the jury shall be the judges of the law and the facts *after the charge*, and not of questions of law arising during the trial, and necessarily decided before the case goes to the jury.

The admissibility of testimony can not be determined if the complaint is first made when the statement of a witness is reiterated. *State vs. Holmes*, 40 An. 170; *State vs. Donelon*, 45 An. 755.

The principle is well settled that if evidence had been offered to show bias, improper motive or recent fabrication on the part of a witness, previous account given at a time unsuspicious is admissible on a redirect examination. *Best's Principles of Evidence*, p. 633.

State vs. Callahan, p. 444.

No delay is provided by law for arraignment, after an indictment, in order to enable an accused to prepare his preliminary defence. Such an indulgence is within the discretion of the trial judge.

The well established rule of jurisprudence is that the affidavit of the accused for a continuance is, for the purposes of the motion, taken as true; and no counter affidavit nor evidence *aliunde* can be received *pro* or *con*.

It may be that a continuance is granted, on a showing made by the defendant, that a fair and impartial trial could not be had at that time, owing to public excitement being so great against him as to intimidate and swerve a jury that might be chosen to try the case; but such is an exceptional case, and the allowance *vel non* of a continuance is within the sound judicial discretion of the judge, under the circumstances of the case presented to him.

State vs. Abshire, p. 542.

The charge of the court on a trial for murder that the killing is proved; that there is but little question of manslaughter and none of justifiable homicide, and implying that the prisoner was present; whose actions and conduct the jury are instructed they may consider, clearly express conclusions of the court on the facts, in violation of the law, prohibiting such expression. The

CRIMINAL LAW—Continued.

departure from the law is made more distinct, when it appears from the bill the defence claimed the prisoner was not present when the crime was committed. Rev. Statutes, Sec. 991; Constitution, Art. 168.

State vs. Collins, p. 578.

The proof disclosing that the confession of an accused was freely and voluntarily made, it is of no consequence that fire-arms were, at the time, deposited in the room where the parties were, though not exhibited to the defendants, they having been procured for a purpose altogether different from that of the intimidation of the accused.

Hypothetical questions put to white jurors, sworn on their *voir dire*, touching their prejudices against people of the colored race, do not present a question the court can decide, although there is evidence annexed to the bill; the trial judge having assigned no reasons for his overruling defendants' objection to the tendered jurors.

State vs. Watt, p. 680.

Act 124 of 1874 creating the Superior Criminal Court for the Parish of Orleans does not repeal Sec. 812, R. S. Hence, when the judge sentences the defendant, convicted of petty larceny, to hard labor for one year, the sentence is supported by Sec. 812, R. S.

State vs. Henderson et als., p. 642.

The Act No. 52 of 1894 directing changes in the terms of the country courts required the action of the District Judges to make effective the proposed changes, and the drawing of the jury before the requisite orders were made to carry the act into effect will not be vitiated, the jury drawn being in attendance at the term fixed by the rules in force when they were drawn, that term coinciding with that fixed by the orders of court under the act of 1894.

If, indeed, any defect in such drawing of the jury could be deemed to exist, it would be within the purview of the law requiring objections to any defect and informalities in drawing juries to be made on the first day of the term. Acts 1877, Reg. Sess. No. 44, Sec. 11.

CRIMINAL LAW—Continued.

The court recognizes the principle that indictments for statutory offences will be sufficient following the terms of the statutes, and if rejecting surplusage they state the statutory offence.

There is no duplicity in the count of the indictment charging an offence, if words are added supposed to refer to another offence, but which is not described with the particularity exacted to support an indictment for such other offence. Wharton's Crim. Law, Secs. 364, 382, 622; 1 Bishop Crim. Prac., Sec. 480.

Applications for severance are addressed to the legal discretion of the trial judge, should be granted if cause is shown, and if the bills show such cause, the refusal of the trial judge will be reviewed and corrected on appeal.

When two persons are indicted, the defences being antagonistic and the confessions of each incriminates the other and designed to be used in evidence, the severance, if asked reasonably, should be granted. 1 Wharton's Crim. Law, 7th Ed., Sec. 733; 1 Bishop, Crim. Proc., Sec. 1019.

If the severance in such case is refused, and the confessions are used to convict, the verdict will be set aside on appeal.

State vs. Desroche et al., p. 651.

On the trial of an application of a party indicted for murder to be released on bail, there is no necessity, unless he asks that he be brought before the court, for the accused to be personally present, as the legality of his detention is not called in question. The sheriff as an officer is not legally concerned whether the application for bail be granted or not. The District Attorney of the district in which the criminal charge is pending is the proper person with whom such an application should be contradictorily disposed of, and it is proper that the District Judge, if he has taken previous action in the matter, be notified of it.

A mistrial because of a disagreement of a jury as to a capital offence does not furnish the accused the absolute right to give bail. That fact, coupled with other circumstances, simply affords proper matter for the court to consider in exercising its discretion as to whether or not it will admit to bail.

Bail is frequently allowed for considerations independent of the merits of the prosecution, as, for instance, the dangerous illness of the accused, or long delay in bringing his case to trial. Such

CRIMINAL LAW—Continued.

cases are addressed to the sound discretion of the court, and the conduct of the prisoner after his indictment enters as a factor into their determination.

Where the record brought up shows that a mistrial in a capital case was followed by an application by the accused for bail—that the application was granted, but that instead of furnishing bond the party escaped—that thereupon the order was revoked by the District Judge. That subsequently, the prisoner being in confinement, his case was called for trial, but over his objection it was continued for five months; that he made a second application for bail to the District Court, which was refused (the court refusing to hear testimony), and he then applied to the Supreme Court for relief—that court refused the writ—there being no attempt to establish before it that the return of the accused to imprisonment was through his voluntary act, and there being nothing before it which was not before the District Court upon the second application. That the accused had, after escaping, voluntarily surrendered himself, is not established by a proffer before the District Court to prove that fact, and a refusal by the District Judge to hear testimony upon the subject brought before it. The facts connected with his return are merely asserted, and not attempted to be shown to the Supreme Court by evidence. The bill of exception taken in the District Court does not, *per se*, establish the facts referred to.

State ex rel. Vickers, p. 662.

In all cases where correct copies of indictment and service have not been served on the accused, he must make his objections before trial, otherwise he will be considered as having waived them.

Id. p. 912.

Where the testimony of a witness has been assailed as to a particular fact stated by him, similar prior statements made at an unsuspecting time may be received, to corroborate his testimony.

Article 173 of the Constitution and Act 78 of 1890 create two distinct offences, the giving of a bribe, and the receiving of the same. There may be no intention to bribe by the giver, but if the party who accepts the same does so with the intent to influence his official action, he is guilty under the statute.

CRIMINAL LAW—Continued.

A general charge, which substantially covers the special charge requested, will justify the rejection of the special charge.

It is legitimate and proper to adopt devices or traps to detect crime, provided the device is not a temptation and solicitation to commit it.

The doctrine of estoppel does not apply to the State in criminal proceedings.

State vs. Dudoussat, p. 977.

Where a written charge has been requested and given, and the jury, after deliberating, returns into court and asks for instructions, in the absence of a bill of exceptions containing the oral instructions, it will be presumed the trial judge confined himself to his original charge. The absence of counsel for the defence, when the jury returns, is not sufficient to set aside the verdict.

Where the jury returns into court and informs it that they are unable to agree, it is not error for the judge to impress upon them the importance of the case, and urge them to listen to argument and sacrifice the pride of opinion, and send them back for further deliberation, when it does not appear that the jury was coerced into a verdict by a prolonged session, followed by physical suffering.

The difference between this present case and the Callahan case (47 An. 444) is obvious. In the latter case it was conceded the witness to be corroborated was an accomplice in the fullest sense; in this case the guilty complicity of the witness is put at issue by argument and testimony laid before the jury.

The distinction between the accomplice and the feigned accomplice is recognized. When a feigned accomplice, the corroboration is not that required to sustain the credit of the ordinary accomplice. 1 Greenleaf, Sec. 382.

Id. p. 978.

A conviction resting exclusively upon the testimony of two accomplices, by a jury in part composed of persons who participated with a voluntary *posse* in chasing after and running down the defendant, and which jury was drawn from a *venue* selected by only three of six jury commissioners, one of whom had, before and after the trial, taken a most active and conspicuous

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CRIMINAL LAW—Continued.

part in securing the defendant's arrest and conviction, can not be sustained as the result of the fair trial "by an impartial jury" which is guaranteed by the Constitution to one who is accused of crime.

State ex rel. Duncan et als., p. 1025.

An accused has the burden on him of establishing a plea of insanity to the satisfaction of the jury beyond a reasonable doubt. The State is not bound to affirmatively prove the insanity of the accused.

State vs. Clements, p. 1088.

When two persons are indicted for the same offence and only one placed on trial, a verdict finding the accused guilty is sufficiently certain to identify the accused against whom the verdict is directed.

State vs. Tolliver, p. 1099.

The rejection, on cross-examination, of a State witness, of questions propounded to him to bring out (as part of a conversation to which witness had referred in his direct examination), certain statements which it was assumed had been made by the accused to the witness, is not a ground of complaint when these statements have gone to the jury through the testimony of this same witness, when on the stand in rebuttal, and also through the testimony of another witness.

When instructions given by the judge to the jury correctly and fully state the law, it would be worse than useless to give additional special charges to them on points accurately covered. A multiplicity of charges only tends to confuse them.

State vs. Martin, p. 1540.

It is a general rule that a party can not impeach the testimony of his own witness.

When a party is *bona fide* surprised at the unexpected testimony of his witness, he may be permitted to interrogate as to previous declarations made by him inconsistent with his testimony, the object being to prove the witness' recollection, and to lead him, if mistaken, to review what he has said.

If the sole effect of such interrogation is to discredit the witness,

CRIMINAL LAW—Continued.

apart from statutory regulations, such evidence is not admissible. But if the purpose be to show that the witness is in error; it is admissible.

Though the answer of the witness may involve him in contradictions, calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry, as proof by other witnesses that his statements are incorrect would have the same effect.

State vs. Vickers, p. 1574.

When a witness for the State, on the trial states an important and material fact on cross-examination which he failed to state as a witness on a former trial, this omission of the fact from his former statement can not be used as a means of impeaching his testimony directly by the State.

The State can not impeach its own witness by asking irrelevant questions, the object of which is to discredit his testimony.

It is too late on a motion for a new trial to urge objections to the judge's charge, when no instructions on that point were asked and no exception made.

Id., p. 1575.

An information which charges the defendant with having robbed another of a designated sum of lawful money, the currency of the United States, charges a statutory offence within the intentment of the Revised Statutes, Sec. 810, and the consequence is, that it is valid and sufficient, being in the words of the statute, or those certain and equivalent having been employed.

State vs. Corbes, p. 1587.

The court again affirms that juries may convict on the testimony not corroborated of the accomplice if they believe his testimony. 1 Greenleaf, Secs. 372-379; 1 Archbold, p. 502; 25 An. 522; Constitution, Art. 168.

The decisions in the Callahan and Dudoussat cases do not trench on previous decisions in reference to accomplices. One of these decisions holds that if corroboration of the accomplice is attempted, it must be by that species of confirmatory testimony the law exacts in such cases; the other holds that this court will not set aside a verdict on the ground that illegal testimony was admitted to sustain that of the accomplice when

CRIMINAL LAW—Continued.

it was an issue of fact with which this court can not deal, whether or not the witness was a feigned accomplice or an accomplice at all. 47 An., pp. 444, 997; Constitution, Art. 81, limiting the jurisdiction of this court in criminal cases.

State vs. Thompson, p. 1597.

There is no law in this State requiring the service of a copy upon an accused of a *proces verbal* of the action of the jury commissioners in drawing the jury. Rev. Stat., Sec. 992.

The endorsement on an indictment "a *thru* bill," evidently intended for "a *true* bill," will be considered as so intended by the grand jury and to have resulted either from a slip of the pen or mistake by the foreman, whose mother tongue was probably not English, as to the spelling of the word, or as to the word itself.

The objection raised by the accused to the finding of the grand jury went only to *form*, and not to the *charge* presented against him. Under Sec. 1064, Rev. Stat., an amendment was properly ordered by the court.

State vs. Williams, p. 1609.

If the bail exacted by the Recorder is excessive, the accused can appear by simple motion before the Criminal Court and have the same reduced.

We will not entertain an application for reduction of bail until all remedies have been exhausted below.

State ex rel. Milliet vs. Recorder, p. 1677.

The charge of duplicity in an indictment must be timely urged and the ground correctly stated.

A bill signed will receive the consideration of the court, although the trial judge adds as part of his note in the bill that it was not presented in due time and contradictorily with plaintiff's counsel in compliance with the court's rule.

State vs. Means, p. 1535.

On the charge of attempting, by persuasion, to prevent a witness from testifying on an investigation by a grand jury, it is not error that the State witness, in proving the persuasion, was permitted to testify over the objection of the accused, that in the conversation in which the persuasion was used the character of the

CRIMINAL LAW—Continued.

grand jury proceeding was introduced by the accused, and, to some extent, discussed; that discussion being linked with the persuasion, so that the testimony objected to was requisite to show the nature of the persuasion and the motive of the accused in using it. 1 Greenleaf on Evidence, Secs. 51, 52.

On such charge the proof was relevant that when the persuasion was used the grand jury investigation in contemplation, was known to the accused; that he also knew the party sought to be persuaded not to testify was a material witness in that investigation, and the proof that the investigation resulted in indictment is also pertinent.

If, to make the persuasion effective, the accused made a false statement, as, for instance, he had been sent to request the witness not to testify, testimony of the falsehood part of the persuasion is admissible.

The instruction to the jury that under the State Constitution they are judges of the law and fact; they must ascertain the facts from the testimony, applying the law as given by the court, and that they can not rightfully disregard the instructions of the court on the law, affirms the weight due to the instruction; the moral obligation of the jury to respect the charge, and although "must" is used, the charge, as a whole, is in substantial accord with our jurisprudence. Constitution, Art. 168; State vs. Johnson, 30 An. 905; State vs. Ford, 37 An. 465; State vs. Cole, 38 An. 846.

The section of the Revised Statutes under which the accused was indicted punishes the attempt by persuasion, to prevent a witness in a criminal case, in any stage of the prosecution, from appearing or testifying. Revised Statutes, Sec. 880.

To constitute the offence under such section it is not essential there should be pending a criminal case in the technical sense, nor that the witness on whom the persuasion is attempted should be under a summons to appear; it suffices there is in contemplation an investigation on appropriate indictments by the grand jury, of which the accused has knowledge, it being known to him also that the party sought to be persuaded not to testify is a material witness in aid of such indictments, and that with such knowledge such persuasion is attempted by the accused. *Ibid.*, 41 An. 341.

CRIMINAL LAW—Continued.

The "stages" of the prosecution include the investigation by the grand jury, which results in finding the bill; hence, if the persuasion is used to prevent the witness from going before the grand jury, the investigation before that body is a stage of the prosecution in the sense of the statute.

If the attempt is to prevent the witness from testifying in a contemplated investigation before the grand jury, resulting in the finding of the indictment, the offence is accomplished, though the case, in its technical sense, does not exist until the indictment is found. When that occurs the case may be deemed to relate back to the initial step, the finding of the grand jury.

State vs. Desforges, p. 1167.

The order of the trial judge for a subpoena to issue to summon a witness is not a conclusive step in the case which prevents him, before the return of the summons, from ruling for cause sufficient that the accused must make affidavit of the materiality of the evidence in order to delay the trial at the calling of the case for trial.

The refusal of a continuance by a trial judge is, in general, not reviewable.

Where an attempt is directly made to impeach a witness on his cross-examination, he may be corroborated, although not impeached by extraneous evidence.

The confession was admissible against the accused, by whom it was made.

It does not necessarily follow, because an accused is under arrest, that his confession is not free and voluntary.

Instructions must go to the jury that confessions affect only the accused who confessed.

After the alleged crime had been committed, statements against co-defendants are not admissible.

The accused is entitled to his exculpatory with inculpatory statements before the jury. All the statements are admissible, and the jury act upon such part as to them seems true, and reject the rest.

A witness who states that he does not remember whether he made certain statements to persons named, may yet be impeached by

CRIMINAL LAW—Continued.

proof that he did make the statements as charged, which he affected not to recall.

The motion for new trial, reiterating grounds set forth in the bills of exception, will be overruled.

The effect of the confession not having been restricted to the accused, by whom made, the verdict and judgment of the court is affirmed as to the accused who confessed, and avoided and reversed as to the others.

State vs. Johnston et al., p. 1225.

In a capital case where the jury separate, and some are out of sight and out of hearing of the remainder, unattended by an officer, a verdict of guilty will be set aside and new trial granted.

State vs. Moss, p. 1514.

It is not permissible for a trial judge to require the testimony intended to establish the basis for the introduction of dying declarations in evidence to be reduced to writing, in case there is no disagreement between him and defendant's counsel as to what that testimony is.

To render dying declarations admissible in evidence it is only necessary to show, preliminarily, that they were made under a sense of impending dissolution, which soon thereafter occurred.

A declaration of a party accused, made previous to the homicidal assault, does not come under the operation of the rule that requires a basis to be laid for its introduction. It is alone applicable to proof offered by an accused of communicated threats made by the deceased. Such previous declarations of the party accused are admissible for the purpose of showing *animus*, or malicious intent.

The fact of a confession having been made under excitement, and while in a state of great nervousness, does not deprive it of the character of a voluntary statement. Nor is it deprived of that character solely for the reason that it was made to the jailor while he was in close confinement.

It is not competent for an accused to show, upon cross-examination of the jailor as a State witness, that he had, at different times, several days subsequent to the making of the confession, made contrary statements. They are self-serving declarations, and do not fall within the category of *res gestæ*.

CRIMINAL LAW—Continued.

Notwithstanding all witnesses *pro* and *con* are placed under rule and removed from the court room during the introduction of the testimony, it may be permissible for the judge to allow a person who was present and heard the testimony of others, to testify in case he is satisfied that the evidence of such person was made known, on the spur of the moment, to the party offering him, provided no fraud is intended, and no injury is suffered by the adverse party.

Slate vs. Jones et al., p. 1524.

See Juries—Jury Commissioners, Supreme Court.

DAMAGES.

The intentional causing of loss by one man to another without justifiable cause, and with malicious purpose to inflict it, is of itself a wrong, and it is a general principle that every act of man which causes damage to another obliges him by whose fault it happened to repair it.

While it may be conceded that a person has an absolute right to refuse to have business relations with any person whosoever, whether the refusal be based upon reason, or be the result of whim, caprice, prejudice or malice, and that there is no law which could reach him for so doing, it is not equally true that he can always, from such motives, influence another person to do the same without incurring legal liability. The question of liability or not, in different cases, would be dependent upon their own special facts, and upon varying conditions and relations.

Graham vs. Railroad Co. et al., p. 214.

In an action, *ex contractu*, for the violation of a contract no punitive damages can be assessed in the absence of bad faith. When there has been no proof of actual damages, but loss of time and inconvenience has been shown for the technical violation of the contract, compensatory damages of a nominal amount will be allowed.

Judice vs. Southern Pacific Company, p. 255.

Damages will not be awarded for an arrest on a charge of libel based on a newspaper publication embracing the substance of an answer of a defendant in a lawsuit conveying a serious charge

DAMAGES—Continued.

against the plaintiff in the suit, the publication appearing a day previous to the filing of the answer, and the arrest caused by the plaintiff making the affidavit under the evident impression that the defendant prompted the publication of this answer, the arrest subjecting the defendant only to the inconvenience of appearing for examination, followed by his prompt discharge.

For the breach of a contract of sale of a physician's practice, damages for the amount the purchaser claims he would have made from professional practice given up, relying on the contract, do not arise from the breach complained of, and are not within the measure of damages fixed by the law in such cases. Civil Code, Arts. 1980, 1984; Pothier on Obligations, Vol. 1, p. 161; 18 La. 410.

Rigney vs. Monette, p. 648.

One on a trip by invitation in the officer's car and not called upon to pay or show his ticket is lawfully in the car and for any injury done to him by negligence the owners are liable in damages.

Thompson vs. Railroad Co., p. 1107.

The loss which the creditor has suffered, and the gain of which he has been deprived, must be the natural and proximate cause of the wrong. It has been otherwise expressed as the direct, necessary, or legal and natural consequence. It must not be remote or consequential, but the natural consequence. Every man is expected to foresee the usual and natural consequences of his acts, and for them he is to be held responsible and accountable, but not for consequences that could not be foreseen.

The damage must be the proximate consequence.

Dwyer Bros. vs. Administrators, p. 1235.

The law protecting the lawful business by which a man gains a livelihood, gives him an action for damages for improper language and conduct of another tending to the injury of that business, the language and conduct being directed and designed so as to affect persons disposed to deal with the injured party, and deter them from buying from him. Civil Code, Art. 2815; 16 La. 206; 8 Robinson, 84; 5 Rob. 115; 10 An. 699.

For such cause of action punitive damages may be given. Civil Code, Art. 1928; 18 La. 585; 2 La. 76; 8 An. 30.

Graham vs. Railroad Co., p. 1656.

DAMAGES—Continued.

See Actions—Illegal Seizure; Landlord and Tenant; Malicious Prosecution; Negligence.

DEATH BY WRONGFUL ACT.

Railway companies owe no duties to a person on a private switch, who crosses from one platform to another on a car that is coupled to a locomotive about to start, or actually moving. If he remains on the freight train, without the knowledge of the employees of the defendant, and is injured by an accident caused by a defective track, the railway company is not liable for damages.

The risk of passing through the cars, likely to get on the way at any moment, or in the act of moving, was apparent, and should not have been taken.

It not appearing that the switch, on the day of the accident, was impassably blocked by standing cars, the railway company is not liable.

If it was usual to pass from one platform to another through the standing cars (without any objection on the part of the defendant's employees), it does not follow that one has remedy for injuries suffered by the starting of the train after warning by the bell of the locomotive. The imprudence of the lad is the proximate cause of the fatal injury, and not the defective track, which is remote.

Bollinger et al. vs. Railroad Co., p. 721.

DEDICATION.

After being set apart for public use, and employed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel *in pais*, precluding the original owner from denying such dedication.

While a mere survey of land by the owner into town lots, defining streets, squares, etc., will not, without a sale, amount to a dedication, yet a sale of lots with reference to such a plat, when bounded by streets, will amount to an immediate and irrevocable dedication of the latter, binding on both the vendor and vendee.

Leland University vs. City, p. 101.

DEDICATION—Continued.

When a space which is indicated on the plot of a town site as a public street is used, occupied and enjoyed as such for a series of years for the uses and purposes of traffic and commerce, and private rights have been acquired with reference thereto, the dedication to public use has thereby become so effectual as to preclude the owner of the soil from retaking the property free from the servitude of way.

When a dedication to public use of certain spaces as streets is made by a public act duly recorded, the map of plot thereto annexed and made a part thereof becomes part of the authentic evidence of the dedication, and the spaces, measurements and distances may be examined and used in connection with the act in determining the completeness and sufficiency of the dedication.

The acts and conduct of a person who is a party to an authentic act of dedication are bound by the contemporaneous interpretation such acts and conduct have placed upon it, and on the faith of which the public has acted during a series of years, and with reference to which property rights have been acquired.

Armistead vs. Railroad Co., Consolidated, p. 1381.

DIVORCE.

The husband having brought suit against his wife for a divorce, and the wife having reconvened for a separation from bed and board; judgment having been rendered in favor of the defendant and against the plaintiff in the lower court, but same having been reversed and remanded by this court, in respect to the defendant's reconventional demand alone; and said reconventional demand having been thereafter voluntarily discontinued by the defendant. *Held*, that in this situation of the case the marriage was intact and the community undissolved, and that the costs engendered were a tax against the community.

Suberville vs. Wife, p. 68.

DOMICILE.

Where the domiciles of origin and selection are both domestic, the presumption of the revival of intention to return to the domicile of origin does not apply.

The circumstances of residence, the establishment of a business place, the acquisition of a house for a residence, and the declar-

DOMICILE—Continued.

ation of the party and the exercise of political rights, are usually relied upon to establish the *animus manendi*.

- A domicile once acquired, is presumed to continue until it is shown to have been changed. To constitute this change, there must be a residence in the new locality, and an intention to remain there. Both must concur and are necessary.

Succession of Steers, p. 1551.

While it is true that the actual *situs* of personal property which has a visible existence, and not the domicile of the owner, will, in many cases, determine the State in which same is taxable; that same is true of public securities and circulating notes which have acquired the character of property in the place where they are found, yet that rule only applies to such securities and bonds as are operated in market and have thus acquired a domicile or *situs* there.

This rule finds an exception in the case of an insurance company doing business in another State than that of its domicile, and that it is necessary to purchase bonds of that State and deposit same in the treasury as an indemnity for the payment of its risks therein. Such bonds are the avails and incidents of the insurance business and segregated from commerce, and are, consequently, taxable at the domicile of the company.

State ex rel. Insurance Co. vs. Board of Assessors, p. 1544.

DONATIONS.

While the heirs may sue to reduce donations by the father in excess of the disposable portion, they can not attack a *bona fide* sale made by him; and that sale canceling any previous donation, there is no basis for the action to reduce. Civil Code, Art. 1502; 6 Martin, 529; Rachal vs. Rachal, 44 An. 501.

Lavedan vs. Jenkins, p. 726.

When the donation is revoked, the ownership of the donor is reinstated, the same as if there had been no donation. Civil Code, Art. 1749; Scudder vs. Howe, 44 An. 1204; Abes vs. Davis, 46 An. 819.

Id., p. 726.

DONATIONS—Continued.

Donations between the spouses are revocable; the revocation may be tacit; is accomplished by the mortgage, donation, sale and other act of the donor evincing the intention to revoke, and the revocation and subsequent disposition of the property may be by the same act. Civil Code, Art. 1749; Napoleon Code, Art. 1096; Laurent XV, par. 881, 882; 4 Boilleux, 280.

Lavedan vs. Jenkins, p. 725.

ESTOPPEL.

Where property having been ostensibly sold by public act the vendor subsequently seeks reconveyance to himself on the ground that the sale was simulated, and the act resorted to, to place the property under cover from the possible consequences of an unjust lawsuit then pending, the vendee defeats the action through his answers to interrogatories on facts and articles propounded to him, in which he declared the reality of the sale; the latter can not, when the vendor sues him upon the notes, defeat the second action by pleading that the original transaction was against good morals, nor by invoking estoppel against the vendor, based upon the allegations in the first suit that the notes were without consideration, and the sale simulated. A party is not estopped by pleadings unsuccessfully urged.

Godwin vs. Neustadt, p. 841.

Where interrogatories on facts and articles, propounded to a defendant in aid of the special issue involved in a particular suit, are broadened out beyond the strict necessities of that issue, the defendant can not avail himself of his answers thereto in another suit involving new issues.

Id., p. 842.

The plaintiff and defendant in a petitory action, having both derived title through a common source, that is to say, an agreement between three persons to make entries of government lands and divide same between them in certain determined proportions, must look to, and abide by the terms and conditions of acts and contracts made and entered into between themselves, at different times, in reference to said lands, for the ascertainment of their respective interests therein.

ESTOPPEL—Continued.

And if, during the progress of negotiations, one of the joint owners becomes invested with *complete* title to the whole property, and afterward his heir and legal representative enters into a transaction and compromise with the widow and heirs of another of his associates, in respect to the common property, making a relinquishment to them of all his rights, except as to the portion he reserves and retains, it has the legal effect of an estoppel against the subsequent assertion of any right, title or interest of said heir, or that of his assigns, as against said widow and heir and their assigns. *Williams vs. Drew, p. 1622.*

EVIDENCE.

It is sometimes impossible to dispense with evidence in its character hearsay in proof of remote and collateral matters, but tribunals should be on their guard when the actual point at issue in a cause depends wholly or chiefly upon it.

It is from its nature very much exposed to fraud and fabrication. While the certificate of a curate in a foreign country, properly authenticated, is admissible in evidence to prove facts evidenced by copies of his records which he is bound to record; as to matters it is not shown he was bound to record, his statement should, at least, be explained and corroborated.

Succession of Justus, p. 302.

The case is remanded at the instance of the adjudicatee of property, to enable him to obtain other testimony disproving or explaining any of the entries on the curate's certificate. *Id., p. 303.*

Allegations in a petition and an affidavit for an attachment are admissible only in evidence, but not conclusive in favor of one not a party to the suit, hence such allegations are open to explanation and correction by proof of error. 1 Greenleaf, Secs. 204, 206, 209, 212; 1 Rice on Evidence, pp. 446, 447; Mallard vs. Armistead, 6 An. 397.

Lachman & Jacobi vs. Block & Bro., p. 506.

The recognition of an asserted debt or promise to pay it, is admissible, but not conclusive against the party, and may be shown to have been made in error. 1 Greenleaf on Evidence, Secs. 204, 209, 212; 7 Rob. 388. *Id.*

EVIDENCE—Continued.

There are many circumstances which, being shown, would authorize the introduction of parol evidence to prove the contents of written instruments. Where such evidence has been admitted, without objection, a refusal of the court to charge that the evidence was "illegal" furnishes no ground of complaint when the bill of exception reserved does not negative the existence of facts which would authorize the introduction of secondary evidence, nor show wherein the evidence was "illegal."

The refusal of the court to permit an accused, charged with having violated a criminal statute prohibiting the sale of liquor within three miles of Ruston College, to show that the college building was destroyed, was correct—it not being averred that the building was not in existence when the act charged was committed, nor that the operations of the college were broken up by the destruction of the building. The law did not become inoperative by that fact.

State vs. Edwards, p. 688.

Letters signed A. per B. are admissible in evidence to show what representations were made to a vendee by A. to induce him to purchase, when B. holds title to the land merely for the accommodation of A., or the party he represents as agent.

Northrup vs. Lavedan et al., p. 715.

Although the cross-examination of the witness for the State is closed, the defendant's counsel should be allowed to question the witness as to contradictory statements by him, so as to afford the basis to introduce proof of such statements, and thus impeach the witness' credit, the witness being at hand, and on the stand, and the exercise of the right claimed on behalf of the prisoner operating no delay or injury to the State. . 1 Greenleaf on Evidence, Sec. 462; 8 Robinson, 562.

State vs. Nixon, p. 836.

Without adequate proof of judgment of divorce *a vinculo matrimonii* having been signed by the judge, the claim of a woman once married legally can not be disregarded in a controversy between her and the public administrator, relative to appointment of an administrator.

Succession of Barry, p. 838.

EVIDENCE—Continued.

In such controversy the title of the opponent is not put at issue, and the court only deals with the *prima facie* validity of her claim to the estate of the deceased.

Succession of Barry, p. 838.

A letter is not admissible against a party by whom it purports to have been written unless proof is first made that he wrote the letter, either by positive proof or by proof of handwriting.

The fact alone that such letter bears the postmark of an office at which the party sometimes received his mail does not make it admissible.

A verdict by which the jury declare that they find the accused guilty, has reference exclusively to the party or parties on trial, and is sufficiently certain to identify the accused, against whom the verdict is directed.

State vs. Tolliver, p. 1099.

Where a witness was asked by defendant to state the substance of a certain document, and the plaintiff objects, which objection is withdrawn, and the defendant withdraws the question asked, it is too late, after withdrawing the question, to ask for time to get a copy of the document.

Construction Co. vs. Mayor and Council, p. 1289.

When the object and purposes of a suit is to annul an award of arbitrators, the burden is on plaintiff to demonstrate its incorrectness in point of fact, and, failing to discharge it, the attack must fall and the award left in full force.

Elevator Co. vs. City, p. 1851.

In all cases of conflicting testimony, based upon the recollection of witnesses, and on estimates made by them, it is safe to accept the conclusions of the trial judge, whose position enables him to judge with accuracy of the weight to be given to the testimony of each witness.

Longino et als. vs. Phipps, p. 1430.

Evidence admitted without objection cured the vagueness and insufficiency of the answer.

State vs. Lundie & Rigg, p. 1596.

See Criminal Law—Insolvency.

EXECUTORY PROCESS.

Defendants presenting, in executory proceedings, a sworn answer, alleging a previous settlement of the mortgage indebtedness, and demanding an injunction restraining sale proceedings without bond, will not be entitled to that relief if there are exhibits accompanying same which make an exactly contrary showing.

State ex rel. Noble et al vs. Judge, p. 229.

A mortgage containing the pact *de non alienando* may be foreclosed against the mortgaged property without making a subsequent purchaser of the mortgaged property a party defendant.

Fleitas, Wife, vs. Meraux, p. 232.

The plaintiffs in executory process, by their answer to the injunction restraining their seizure, in which they did not pray for a judgment, or seek in any matter to release the seizure of the property, did not change the proceedings from the *via executiva* to the *via ordinaria*.

Citizens Bank vs. Heirs of Gay, p. 551.

See Mortgage.

EXEMPTION.

The capital and machinery employed in the manufacture of illuminating gas for street-lighting are not exempt from taxation, under the terms of the amendment to the two hundred and seventh article of the Constitution, exempting the capital and machinery employed in the manufacture of chemicals.

Gas, Electric Light and Power Co. vs. Assessor, p. 85.

A person or corporation engaged in the manufacture of new articles of commerce, such as crackers, fancy soup and Italian paste, from flour, is exempt, under Art. 206 of the Constitution, from a license tax.

State vs. Biscuit Manufacturing Company, p. 160.

One who prints bill heads, orders and other forms for commercial purposes on paper bought by him, and who cuts and folds the paper into shapes for such purposes, as well as to serve for ledgers and commercial books, is not a manufacturer of stationery, entitled to exemption from taxation. Constitution, Art. 207.

Patterson & Ray vs. City, p. 275.

Earle vs. City et als, p. 277.

EXEMPTION—Continued.

The importer of shooks or staves, already bent, so as to form a barrel; of barrel heads ready for insertion, and of hoops to be driven, is not to be deemed a manufacturer of a barrel merely because he substitutes machinery for the usual hand labor of setting up the staves in barrel shape, introducing the prepared headings, and driving on the hoops, first subjecting the staves and other material to a heating process, and the machinery and property thus employed is not exempt from taxation under Art. 207 of the Constitution.

The exemption sought in this case distinguished from the exemptions recognized of manufacturers of articles of wood from raw materials. *Martin vs. New Orleans*, 38 An. 397; *Carre vs. New Orleans*, 41 An. 998, and similar cases.

Cooperage Co. vs. City et al., p. 1314.

The uncollected premiums of an insurance company are not exempt from taxation as income.

The shares of the capital stock of a manufacturing corporation, when held and owned by an insurance company, are taxable as being part of its assets, notwithstanding the capital, machinery and other property of said manufacturing corporation are exempt from taxation by constitutional provision.

State ex rel. Insurance Co. vs. Board of Assessors et al., p. 1498.

EXPERTS.

See Witness.

EXPROPRIATION.

Although the defendant does not interpose an answer, or file any claim for the value of property, a decree of expropriation must be preceded by and based upon a valuation of the property by the jury.

A jury's verdict is entitled to great weight in the expropriation proceedings, fixing the value of land sought to be expropriated, and will be annulled only when manifestly erroneous.

Railroad vs. McNeely, p. 1298.

FAMILY MEETING.

In so far as relates to the members of the family meeting, it has been held by this court, in several decisions, that as to third

FAMILY MEETING—*Continued.*

persons, without notice of the fact, the deliberations are not null, although it was not composed of the nearest relatives.

Gilmer, Tutor, vs. Winter et al., p. 38.

The validity of the deliberations of a family meeting is not affected in so far as relates to persons who have acted in good faith, relying upon the judgment of the court, without knowledge of an intended wrong, if wrong was intended by the tutor to his minor children.

Id., p. 39.

The family meeting authorized the tutor to borrow a sum of money for the use and benefit of the minors. The recommendations of the meeting, which were approved by the judge, were that the loan must be made on terms as to time, interest and discount most favorable to the minors. The loan was to be for \$8000. The tutor disposed of the note, which was made payable in nine months, with 8 per cent. interest from date, for \$6625.

The tutor exceeded his powers in borrowing money at such rate. He acted for the minors and had no personal right. He surely was not, without recommendation of a family meeting, authorized to borrow money at such ruinous rate of interest, some forty per cent.

In dealing with the tutor the lender knew, or he should have known, that the former had no power to borrow money at such a rate of interest.

The court deducted the amount which was not within the limits of legal sanction, and affirmed the judgment for the remaining principal, with 8 per cent. interest from the date of the note, the interest being separate from the amount deducted on the face of the note.

Id., p. 40.

The immovable property was within the limits of Louisiana, and the court having jurisdiction of the suit for partition was authorized to direct the proceedings of family meeting here in the interest of minors residing abroad. Not being residents of this State, their residence for the purpose of partition and for the family meeting was at the *situs* of the property. It was never contem-

FAMILY MEETING—*Continued.*

plated that family meetings could be held abroad for the alienation of the immovable property of the minor in this State.

Johnson et al. vs. Barkley et al., p. 99.

See Interdiction.

FATHER AND CHILD.

The father during the marriage is clothed with the functions of tutor in respect to the property of his child, and may petition for the family meeting to consider the expediency of selling such property at private sale. Civil Code, Art. 22; Revised Statutes, 2359; Act No. 25 of 1878.

The under-tutor is properly appointed on such petition and is entitled to ask for the homologation of the proceedings. Civil Code, Art. 225.

Nor will it make the least difference that the order of the court designates the father in such case tutor, when in fact he is competent to exert the functions of tutor.

The parish courts, under the Constitution of 1868, were competent to grant orders for family meetings and homologate their proceedings in such cases, and a sale made in accordance with the judgment of homologation passed the title to the minors' property. Const. 1868, Arts. 87, 68; Act No. 25 of 1878; *Duruty vs. Musacchia*, 42 An. 359; *Bruhn vs. Building Association*, *Ibid*, p. 482.

The decree of homologation in such cases protects the purchaser especially when the objection suggested to the title is that the family meeting gave no reasons for their recommendation of the sale. *Lalanne's Heirs vs. Moreau*, 13 La. 431; *Succession of Hawkins*, 35 An. 593.

Dauterive vs. Short et als., p. 882.

The husband is presumed to be the father of the child born of the wife during the marriage, and as separation from bed and board does not dissolve the marriage, it follows that the child, to which the mother not divorced gives birth after the separation, is within this presumption of paternity the law fixes on the husband; as one of the leading commentators puts it: "Comme la separation du corps ne dissout pas le mariage, il suit de la, que la presumption de paternité établie par l'article 312 subsiste

FATHER AND CHILD—Continued.

encore." Civil Code, Arts. 184-185, 159-166; Code Napoleon, Arts. 312, 306, 310; 1 Duranton, p. 306, par 632: Le jugement de separation de corps laisse qui subsister le mariage ne peut faire cessa le presumption de paternite de l'enfant concu depuis la separation. 2 Touillier, p. 124, par. 811; 2 Boillieux, commenting on Art. 318, C. N., p. 72.

This presumption of the paternity of the child of the wife, born since the separation from bed and board, is not conclusive; the husband is permitted to dispute it by suit; but if the paternity of the child is not thus disavowed by the husband or his heir, the presumption that the husband is the father becomes absolute, and the legitimacy of the child placed beyond question. Civil Code, Arts. 188, 191; Napoleon Code, Art. 313, as amended by the law of 1850, Art. 318; 1 Dalloz, Code Annote, Art. 318; 2 Boillieux, 79, 73; 3 Laurent, p. 480, par. 376; 2 Marcade, commenting on Art. 318, as to form action en desaveu; 2 Boillieux, 87, 88; 1 Rob. 585; 44 An. 441.

The Code, in declaring the legitimacy of the child, born three hundred days after the separation from bed and board, may be contested by the husband, defines the extreme duration recognized by law of the period of gestation which, with certain exceptions, must elapse to permit of the dispute by the husband of the legitimacy of the child, but the period beyond the three hundred days to the birth of the child of the mother separated from bed and board, not divorced, is unimportant on the question of legitimacy; the requirement of the law on that issue is that the husband, or his heir, shall disavow the paternity of such child by suit, and maintain the disavowal by proof. Civil Code, Arts. 188, 191, and authorities cited above.

McNeely, Tutrix, vs. McNeely, Executrix, et al., p. 1821.

FRANCHISE.

Railroad companies with franchises to use the same street may be required to use one track, and in the exercise of this power a company may acquire the right to use the tracks laid by another, but compensation for such use must be made. City Charter, Acts 1882, Sec. 7; 39 An. 709; 41 An. 561; 44 An. 485; 47 An. 315.

FRANCHISE—Continued.

If the tracks thus subjected to the common use of the two companies are unfitted by age, long use or other cause, to serve the purposes of these two companies, an action may be maintained by one against the other to compel the repair or reconstruction of the tracks at the joint expense of the companies.

Railroad Co. vs. Railroad Co., p. 1476.

GARBAGE.

The corporation may contract with the highest bidder in order to remove and destroy, under certain regulations, the offals that are annoying to health. The record does not disclose that the contract was entered into in violation of law. Under the state of facts here, the defendant, not being the occupant of the premises, had no interest to complain of the mode adopted for collecting and removing the garbage.

State vs. Payssan, p. 1029.

Act 14 of the extra session of 1877; Act 42 of 1882 and Act 94 of 1888, relative to the disposal of offal, garbage, night soil and dead animals, do not affect Sec. 7, Act 20 of 1882, the charter of the city of New Orleans.

State vs. Morris, p. 1660.

GOVERNMENT.

The government having known and dealt only with the factor, the legal title to the claim for bounty was vested in him, and having been so vested under a contract which, if innominate, was legal as between the parties, the fund derived under the license could only be withdrawn subordinately to compliance with the conditions of the contract.

Webre, Syndic, vs. Beltran & Co., p. 195.

The government having thought proper to make a grant of an amount to the heirs of one of the victims of a disaster, they receive it as a gift, a bounty.

Succession of Mulledy, p. 1580.

GOVERNOR.

See Office.

HABEAS CORPUS.

Application for relief by *habeas corpus* must be refused, in case the defect alleged to exist in the warrant for relator's arrest does not appear to be radical or jurisdictional.

State ex rel. Goldberg vs. Constable, p. 949.

HOMESTEAD.

Plaintiff averred in his petition for an injunction the essentials which he claimed exempted his property from seizure under the homestead law of 1865, without naming the act in terms.

He also averred that he had registered his declaration of homestead as required by the Constitution of 1879, and the homestead enactment of 1880.

The statement of the demand under the latter, in definite and precise terms, did not have the effect of relinquishing or waiving any right of exemption he may have under the exemption law of 1865.

Under the allegation based on his recorded homestead declaration that he was the head of a family and dependent children, the plaintiff could prove that after his children were no longer dependents, and their mother dead, his dependent family consisted of a wife of a second marriage and other dependents.

Hebert vs. Mayer and Sheriff, p. 563.

HUSBAND AND WIFE.

The sale by the wife of the property donated by the husband, made with his authorization through an agent with power to consent to and authorize the sale; the power describing the property as standing in his wife's name, is in legal effect the same as if made by the husband, he having the power to revoke the donation and sell; and treating the property in the act as that of the wife, is a mere form not detracting from the effect of the act as a sale by the husband, being both a revocation and a sale by him.

Nor could the husband, consenting to the sale and thus inviting the payment of the price, afterward claim the property on the ground the donation was not canceled by the sale, was still subject to revocation reinstating the ownership of the husband; such pretension by him would be deemed an attempted fraud on the purchaser, and the sale would be maintained as conveying full title to the purchaser. *Bigelow on Estoppel*, 541.

Lavedan vs. Jenkins, p. 725.

HUSBAND AND WIFE—Continued.

The law applicable to the revocatory action can not be invoked to set aside a *dation en paiement*, made by the husband to the wife, to replace her paraphernal effects. The law favors restitution to the wife, and looks with favor upon the efforts of the husband to secure the just and honest claims of the wife against him.

The facts essential to the validity of the *dation* are the just and honest claims of the wife against her husband; the just proportion of the value of the thing given and the wife's debt, and the delivery to the wife of the thing given.

Since the adoption of the Constitution of 1879, and in the absence of legislation requiring the recordation of privileges on movable property, the privilege exists as against the world, and in a *dation en paiement* the wife takes the property subject to the privilege existing on it.

Hewitt vs. Williams, p. 742.

The only test of the paraphernality of the title of a married woman, during the existence of the community, is to be found in proof of the existence, origin and investment of her paraphernal funds under her separate administration and control.

The Code declares that when paraphernal property is administered by the husband, the fruits thereof, whether natural, civil, or the result of labor, belong to the community; and the converse of that proposition is true when it is administered by the wife.

The husband's failure to authorize the wife's signature to an act of sale to her is a relative nullity that can only be availed of in a direct action brought by the husband, or his heirs; and, in case of sales at public auction, it is prescribed by the lapse of five years from the time the act is passed. And such unauthorized contract may be validated, after the marriage has been dissolved, by either express or implied ratification.

Rouyer et als. vs. Carroll, p. 768.

The husband deserted his wife after two weeks' marriage and permanently disappeared.

The wife bought real estate with her paraphernal funds during the marriage.

HUSBAND AND WIFE—Continued.

She sold it after the dissolution of the marriage. It was her property and never belonged to the community. The title involved here is valid and legal.

Reinach vs. Levy, p. 963.

The wife may, after the death of the husband, ratify the act by which she had bound herself and her property for his debt during his lifetime. The nullity of such act is only absolute in this sense, that she can not ratify it as long as she is under marital influence. The ratification may be express or tacit. *Lafitte vs. Delogny*, 33 An. 658.

In executed contracts which may be tacitly ratified a presumption of ratification results from silence and inaction during the time fixed for prescription.

The prescription of five years, under Art. 3542, C. C., applies to an action brought by a wife to set aside a judicial sale which had been made during her husband's life, in enforcement of a mortgage granted by her to secure his debt. *Vaughn vs. Christine*, 3 An. 330. Prescription commences, as fixed by Art. 2221, C. C., from the date of the dissolution of marriage.

The prohibition contained in R. C. C., Art. 2398, does not apply to and is not founded upon public order. It is only a *personal statute*; founded exclusively upon the personal relations between husband and wife, and resulting from marriage under our law. It establishes an incapacity to contract, which, though absolute in a certain sense, and so long as the marital influence continues, is, like the incapacity of a minor, voidable only, and may be the subject of ratification, whether expressed or implied, after marital influence has ceased.

Brownson vs. Weeks et al., p. 1042.

The insolvent condition of the husband and alleged suspicious circumstances at the time of a *dation en paiement* may exist, but if the reality of the indebtedness of the husband to the wife is shown and the property transferred bears a just proportion in value to the indebtedness and the wife is placed in possession of the property, the *dation* will be maintained.

If the father advances money to his son-in-law, who is in commercial business, with the intention that it shall be used in

HUSBAND AND WIFE—Continued.

said business, and it is so used, the *intention* of the father that the advances were made for and in behalf of the wife can not prevail over the fact that the money was actually loaned to the husband. And the same may be said of land transferred to the husband for the purpose of raising money for his firm. The reason is the stronger when the husband is a silent member of the firm, lending it his name in order to strengthen its credit.

Ardis & Co. vs. Theus & Armistead et al., p. 1436.

ILLEGAL SEIZURE.

Damages for an illegal seizure will not be awarded in favor of the claimant of the property in case his title be involved in litigation, or doubt reasonably exist as to its reality.

The law favors the right of a creditor, and will protect him in every reasonable and proper effort to collect his debt, and will only mulct in damages those who resort to illegal or wanton acts to unduly and illegally coerce payment.

The owner whose property has been seized as that of another, and who is compelled to go into court to protect his rights, is entitled to be reimbursed by the seizing creditor a reasonable amount for counsel fees.

Gilkerson-Sloss Co. vs. Yale & Bowling, p. 690.

Gilkerson-Sloss Co. vs. A. Baldwin & Co., Ltd., p. 696.

INJUNCTION.

An order of injunction having been subsequently modified, contempt proceedings will not lie against the defendant in injunction on a charge of having violated the order of injunction as it was, originally, granted; and prohibition will lie to restrain the further progress of such proceedings.

State ex rel. Schoenhausen vs. Judge, p. 696.

Apprehension that the conclusion and decision of the board will be erroneous is not ground for an injunction.

Injunction will not issue for the purpose of controlling the action of public agents acting under legislative authority, unless irreparable injury is evident.

Railroad Co. vs. Board of Arbitration, p. 875.

See Executory Process.

INSOLVENCY.

The voluntary cession of his property by a debtor does not impair the obligation of his legal contracts. Where the commission merchant of an insolvent planter has a privilege and *statutory pledge* upon a growing crop of sugar and molasses to secure advances which he has made upon the same—he is entitled to have the crop shipped to him for sale according to the stipulations of the contract for supplies. The syndic of the creditors is as much bound to ship the crop as the insolvent himself would have been.

If among the assets of an insolvent there be a thing which has been pledged, the possession of it does not pass to the creditors, being vested in the pledgee. The obligation of the pledge is contractual. It vests in the creditor the right of possession and privilege on the thing pledged. The right of detention being as much a part of the security as the things pledged are part of the guaranty, the creditor can not be deprived of the same by his debtor.

Where, under a verbal agreement with a sugar planter, as part of the general arrangement under which a factor has stipulated to furnish him supplies for a growing crop, a factor himself applied to and obtained from the United States authorities a license as the producer of the crop (giving the bond required in such case), and under such license received from the government (after a cession of his property by the planter) the bounty allowed on such crop, the syndic of the creditors ignore the stipulations of the contract between the parties, that the fund when received shall be applied, as imputed by the factor, to the debts due him by the planter, and require that the bounty be at once turned over and the factor forced (after possession of the same has been shifted from himself to the syndic) to litigate his rights and claims upon it inside of the insolvency *in concurso*, the rights of the creditors must be protected in some other manner.

Webre, Syndic, vs. Beltram & Co., p 195.

The opposition to a syndic's account requires proof of their debt from the creditors whose debts are opposed.

That proof is not afforded merely by the insolvent's books nor by testimony as to entries in them, not binding as against the creditors of the insolvent.

INSOLVENCY—Continued.

Where it is apparent the proof exists material to the issue, but not furnished from misapprehension or other cause not implying any design to withhold the proof, or gross neglect on the part of the litigant, in such cases, in furtherance of justice, the court, reluctant to dispose of the controversy on an imperfect record, will remand the cause. 8 Martin, 170; 6 N. S. 808; 16 La. 477; 1 H. D., p. 94, No. 1.

Calder & Co. and Calder vs. Creditors, p. 1589.

INSURANCE.

An insurance company can not resist the payment of a policy obtained in good faith, and without misrepresentation, issued to a firm, when there is only one person in said firm; particularly when the agent issuing the policy knows that only one person composes said firm.

It is no defence to the payment of the loss, that the policy was signed by officers who had ceased to be such when the policy issued.

A party who obtains a policy from a former agent of the company with whom he had done business, and who has in his possession blank applications and policies, will be protected in the absence or actual knowledge on his part that the party acting as agent was, in fact, not the agent of the company.

Section 2868 R. S. was intended to prevent the use of the name of a person evidently interested in the firm, thus inducing a false credit which the law designed to prohibit. It does not forbid the giving of credit. 45 An. 1100.

Pelican Insurance Co. in Liquidation, p. 935.

In the matter of insurance, there is a marked distinction between a warranty and a representation, the latter constituting part of the proposal for insurance and the former part of the contract of insurance.

As a general rule, it has been laid down that a warranty must be a part and parcel of the contract of insurance, so as to appear on the face of the policy itself, as in the nature of a condition precedent.

It must be strictly complied with, or literally fulfilled, before the insured is entitled to recover on the policy.

INSURANCE—Continued.

The warranty need not be material to the risk, because it is of itself an implied agreement that the representations warranted are material.

A representation is not, necessarily, a part of the contract of insurance, nor is it of its essence; but it is rather something collateral, or preliminary, and in the nature of an inducement to it. It should, ordinarily, by some phraseology of the policy, be made part thereof.

A false representation, unlike a false warranty, will not operate to vitiate the contract, or avoid the policy, unless it relates to a fact actually material or clearly intended to be made material by the agreement of the parties.

Weil, Administrator, vs. Insurance Co., p. 1405.

When proofs of loss are furnished and a negotiation follows between the assured and insurer, ended by a disagreement as to the basis for the adjustment of the loss, it will be no defence to a suit on the policy that plans and specifications were not furnished by the insured, it being apparent that if furnished there would have been no solution of the difference and suit was inevitable. Wood on Fire Insurance, 414 *et seq.*

The condemnation and prohibition of any attempt to repair a building made unsafe by injuries from fire, is within the police power of the city. City Charter 1882; Act No. 20, Secs. 7 and 8.

When the building insured is so injured by fire as to be made insecure and a menace to life, is condemned by the proper authorities and an attempt to repair it is prohibited by them, the insured may claim a total loss, although the building when insured was not sound. Wood on Insurance, Secs. 445, 446; May on Insurance, Sec. 433; 127 Mass. 309; 19 Wall. 640; 11 Mich. 446; 54 Cal. 450; 18 S. W. Rep. 337; Am. Dig. for 1893, 2171, No. 816.

In such case the indemnity of the insured is not useless repairs, but the value of the building.

An insurance on front and rear building covers connecting walls. Wood on Insurance, Sec. 474; 2 La. 507.

Monteleone vs. Insurance Co., p. 1564.

INTERDICTION.

A tutor of an interdict, residing in a foreign country and regularly appointed by the law of his domicile, may exercise his office by an agent or attorney in fact in relation to the defence of a suit for a partition.

Under the civil law at the foreign domicile of the interdict, the administration of his interest is confided to a tutor. A curator *ad hoc* appointed to represent an absentee does not necessarily waive citation by filing an answer. In the absence of an issue in the lower court, this court will not assume that the answer was not preceded by service of citation and petition.

In the suit for a partition the interdict was represented by the agent of his foreign tutor. The interdict was therefore before the court in those proceedings and contradictorily with him judgment was pronounced.

The judgment referred the parties to a notary to complete the partition.

The curator *ad hoc*, then qualified, represented the interdict.

The domicile of the curator is the domicile of the interdict. Civil Code, Art. 37.

The laws applying to tutors apply also to curators of interdicts. *Id.*, Art. 415.

The court of the minor's domicile has jurisdiction to order a family meeting in his interest.

The same rule applies to the interest of an interdicted person.

Vick vs. Volz, Interdict, p. 42.

JUDICIAL SALE.

The adjudicatee at a judicial sale made in execution of three orders of seizure and sale directed to the sheriff can not refuse to comply with his bid when a valid and legal title is conveyed through the execution of one of the writs, because the sheriff in the execution of the other two writs may have departed from their terms.

A sheriff holding two separate writs of seizure and sale, directing him, in the first, to seize and sell the undivided half interest of one of the joint owners of a piece of property, and in the second, to seize and sell "all the right, title and interest" of the other joint owner (who held also an undivided half interest) is without authority to advertise and sell the property as an en-

JUDICIAL SALE—*Continued.*

tirety, ignoring the terms of the writs he was enforcing and disregarding the different ownerships of the undivided halves. The writ in the sheriff's hands is the warrant for his action. He can not seize and sell under the different writs the property of different individuals between whom there is no privity.

Danneel vs. Klein, p. 928.

Though the subsequent acquisition by a vendor of property which he had sold before he was the owner thereof inures to the benefit of his vendee, the latter's rights are held subordinated to the vendor's privilege and special mortgage, with which the property passed unencumbered into the ownership of their vendor, and these rights are cut off by a judicial adjudication made to the mortgage creditor in the settlement of his succession.

Barkley vs. Succession of Heirs, p. 951.

A person can not invoke a breach of warranty between his own vendor and the person who sold to him, unless there be privity between himself and that vendor in respect to the subject matter of the call in warranty. In the absence of privity his own contract measures his right of warranty.

Id., p. 952.

It is no ground for setting aside a judicial sale that the movables attached to a plantation which were about to be sold in block with it, under a seizure, should have been fraudulently undervalued in the separate appraisement of the land and the movables, made with the view to fix the *pro rata* of the proceeds of sale, to be paid to the mortgage claim upon the land and to the privileged claim upon the movables. The relief of the privileged creditors upon the movables, if any they have, is limited to the setting aside of the fraudulent appraisement, and to a distribution of the price upon a new valuation. *Succession of Lenel*, 34 An. 868.

It is not a ground for setting aside a judicial sale that the writ under which the property was sold issued for a larger amount than was due (*Lynch vs. Kitchen*, 2 An. 848), nor because, prior to the sale, the seizing creditor had consented, in the event of his purchasing the property, to make a subsequent disposition of it

JUDICIAL SALE—*Continued.*

to a third person in the interest of the seized debtor. The subsequent disposition might be attacked, but the sale should stand, as the creditor in seizing, selling and purchasing, would have only exercised a legal right. 43 An. 432, 873.

Where a mortgage creditor has seized a plantation, subject to his mortgage, together with all the mules, carts, agricultural implements thereon, in view of an anticipated sale of the property and the realization of a fund therefrom, the laborers who claim a privilege for payment of wages due them have an unquestionable right to present their claims to the District Court by way of third opposition, without reference to the amounts claimed by them being within the jurisdiction of that court. *Shiff vs. Carprette*, 14 An. 802.

In their contention the laborers had a common interest in invoking the aid of the District Court; the aggregate amount of the claims in dispute being over two thousand dollars, the appeal by plaintiffs to this court will be maintained.

The proceedings attacked as fraudulent were ordered in a suit in the parish of St. James. The seized debtor and the seizing creditors, charged with collusion, are necessary parties to such an action. The seized debtor resided in the parish of St. James. The proceedings were properly attacked in the court of his domicile. Having issued the orders, the District Court of St. James was the proper tribunal to pass upon the issues.

Amato et als. vs. Ermann & Cahn et als., p. 967.

JUDGMENTS.

Voidable judgments are binding until reversed by some direct proceeding. "This principle is not merely an arbitrary rule of law established by the courts, but it is a doctrine which is founded upon reason and the soundest principle of public policy." *Black on Judgments*, p. 245.

Heirs of Brigot vs. Brigot, p. 1309.

The judgment of the lower court will be affirmed, on questions of fact, when the District Judge says the witnesses were of low character, prostitutes and till tappers, were inconsistent in their statements, some of which were improbable, and that upon his conscience he can not accept their statements.

Moustier vs. Wife, p. 1445.

JUDGMENTS—Continued.

The judgment may be corrected before signature, to correct a trivial error as to amount, such an amendment not being one of substance. Code of Practice, Art. 547.

Goldman vs. Goldman & Masur, p. 1463.

The proceeding to revive a judgment begun within the ten years is effective, followed by the judgment of revival, though rendered after the ten years. C. C., Art. 3547; *Martinez vs. Vives*, 30 An. 818.

Fitzpatrick vs. Leake, p. 1648.

JUDGES.

Under the Act No. 146 of 1894, providing an additional judge for the Fifth Judicial District, it is competent for the additional judge to recuse himself, the cause existing, and to appoint a judge *ad hoc* to try the case.

Nor will the defendant be allowed to question the capacity of the judge *ad hoc*, on the alleged ground of the ability, to try the case, of the judge of the district in whose aid the Legislature provided the additional judge; that act leaving it to the two judges "to arrange the judicial work themselves," and besides the bill of exceptions showing the physical inability of the judge of the district to act.

Goldman vs. Goldman & Masur, p. 1463.

JURIES.

Act 89 of 1894 does not require the jury commission to meet at the court house, or at the parish site. The act authorizes the clerk to designate the place of meeting, and for good and sufficient reasons, he can call the commission together at any convenient point in the parish. If the deputy clerk participates in the drawing of the jury immediately under the control and supervision of the jury commission, and does acts by their direction, these acts are those of the commission, and if irregular, must be imputed to the commission. The accused must, therefore, show that some fraud has been practised that does him an injury in the drawing and summoning of the jury in order to avail himself of such irregularities.

State vs. Johnson, p. 1092.

State vs. Shaw, p. 1094.

JURIES—Continued.

Notwithstanding all the names which are drawn from the jury wheel were those of white persons, if proof be not administered that all the names therein were of white people, the theory of the defendant, a colored person, that discrimination against his race was resorted to on account of race, color, or previous condition of servitude, can not be of avail. And proof being made of the fact that persons of African descent were not excluded from the general venire, but, on the contrary, that some colored people were included therein, the charge that the accused has been deprived of due protection of the law is unfounded.

Act 170 of 1884, being an amendment of Sec. 2 of Act 98 of 1880, is not a local or special law, in the sense of Art. 48 of the Constitution—the constitutionality of the original act having been affirmed by this court.

Other bills of exception taken to rulings of the trial judge already affirmed and approved need not be again analyzed.

State vs. Murray, p. 1424.

JURISDICTION.

See Supreme Court.

JURY COMMISSIONERS.

Jury commissioners may be appointed by the judge out of term time, and the fact of the appointment and the evidence of the same may be recorded by the clerk in the minute book at that time.

State vs. Murray, p. 911.

LANLORD AND TENANT.

The remedy to eject lessees is summary.

A rule of court designating certain days to try civil jury cases does not necessarily exclude all possibility of hearing a summary case, particularly if it does not interfere with the trial of the civil jury cases, and the defendant's cause is not thereby prejudiced by being compelled to go into trial unprepared.

The delay to be expressed in the citation to vacate leased premises or the notice consists of three days, to be counted from the date the citation or notice has been served.

The lessee is bound to pay the rent at the terms agreed on.

LANDLORD AND TENANT—Continued.

The taxes (part consideration of the lease) not having been paid, and the time for the payment without penalty having passed, the lessee, from that fact, was in default.

Ricou vs. Hart, p. 1870.

In suits by lessors for possession of the leased premises the law authorizes the citation of defendant to answer after the delay of three days. R. S., Secs. 2155, 2156; 37 An. 843; 44 An. 256.

When the monthly or yearly rent exceeds one hundred dollars the District Court has jurisdiction of such suits. Rev. Stat., Secs. 2155, 2156.

Damages for alleged wrongful conduct of the lessor, in seeking to obtain possession of the leased premises, can not be claimed by reconviction in a suit by the lessor for possession brought under the above cited sections of the Revised Statutes.

Ward vs. Stakelum, p. 1546.

LAST WILL AND TESTAMENT.

"The above and foregoing was written by me, said notary, as dictated by the testator, the said Donald Monroe, in the presence and hearing of the said George W. Kendall, F. Dodd and E. Martin, and then read by me, said notary, to the testator in the presence and hearing of said witnesses, all at one and the same time without interruption and without turning aside to other acts," is a compliance with Act 1578, Civil Code, as it expressly mentions all the essentials to the validity of the will required by said article.

Monroe et als. vs. Administrator et al., p. 155.

Under Art. 1691, C. C., as explained by subsequent articles, there are only two modes of revoking a valid testament—the one by a written instrument, clothed with the formalities of a last will and testament, and the other by donation *inter vivos* or a sale in whole or in part of the thing bequeathed.

The defacement, obliteration or destruction of the will leaves no will in existence, and the Code, probably for this reason, has not named the destruction of the will as one of the evidences of revocation.

LAST WILL AND TESTAMENT—Continued.

The finding of a will in an unusual place, and its apparent abandonment among waste papers, if it is a valid will, does not raise a presumption that the testator intended to revoke it.

After the placing of the will among waste paper, and it is offered to the testator, and he refuses to receive it, saying he wanted it destroyed, his actions toward the legatee, treating him as one he does not like, and his unsuccessful attempts to make another will, do not amount to a revocation. The fact that the testator had it in his power to destroy or obliterate the will, and failing to do so, leaving it in existence, is a presumption that he intended it to be his last will and testament.

Succession of Hill, p. 329.

LAWS.

A rule of the District Court, which requires "leave of the court" to be obtained before sending up original papers to the Supreme Court, yields to the statute. The "order of the law" takes the place of "the leave of the court."

State ex rel. Legendre vs. Clerk, p. 358.

Act No. 8 of the extra session of 1870 "Relative to Crimes and Offences" does not violate and is not in conflict with Art. 114 of the Constitution of 1868, which provides that "Every law shall express its object or objects in its title."

State vs. Breedon, p. 374.

The omission of "The State of Louisiana" in the enacting clause of Act No. 69 of 1890 will not affect the competency of the District Courts of the State sitting in the districts organized by that act; such courts, irrespective of said act, even if it were defective, being created by the Constitution.

State vs. Harris, p. 386.

Statutes of another State not noticed by our courts, unless proved, will not be deemed to apply to a paper made here supposed to create the obligations of a surety, which, if it exists, is to be performed here unless the paper itself is clearly within the scope of the statute, and unless the supposed obligation is clearly excluded from the operation of our law; it being settled that courts in all cases of doubt as to the application of statutes of

LAWs—Continued.

other States follow our law. 5 Martin, 678; 1 N. S. 522; 5 An. 68; 8 An. 124; 5 N. S. 587.

But it is clear the supposed obligation of a surety claimed to arise on a paper executed, and if producing any obligation it is to be performed here by him, is a Louisiana contract, governed by our law, although the paper is designed to be used by a merchant residing here to obtain credit from a California merchant, the law of which State is claimed to differ from that of Louisiana on the subject of suretyship. Story's Conflict of Laws, Secs. 233, 234, 280, 284; 106 U. S. 124.

Lachman & Jacobi vs. Block & Bro. et al., p. 506.

Whenever an election is held under and in conformity with the provisions of Act 76 of 1884, relative to the granting or withholding of licenses for the sale of intoxicating liquors, the majority of votes cast in the parish, if an election has been held for a whole parish, shall be against granting licenses for the sale of intoxicating liquors, said vote or decision shall govern and control the action of any ward, incorporated town or city within the limits of said parish as fully and completely as if said election had been held by authority of said ward, town or city.

The provisions of Act 76 of 1884, in terms, repeal the provisions of the statutes of 1871, 1873 and 1876, which grant and amend the charter of the city of Monroe, in the parish of Ouachita, in so far as they confer any exclusive authority in said city over the sale or prohibition of the sale of intoxicating liquors.

The legislative charter of a municipal corporation being a special act, apart from the body of general laws of the State, it can not be repealed by a general law of the State, unless that intention clearly appears from the terms of the general act; and that the general act shall repeal the special law, it must appear that the provisions of the former are irreconcilably inconsistent with those of the latter.

The General Assembly is the sole and exclusive judge of the time and manner in which the police power shall be exerted, and its action must be liberally construed.

Garrett, Blanks et als. vs. Mayor et al., p. 618.

LAWS—Continued.

Where the State adds territory to a political subdivision, it is not within the power of the latter to so fix the boundary as to exclude from its limits a part of the territory intended to be added to the municipality.

When the State directs the extension of a street to a certain point, to embrace the added territory, the street must be continued in length in the direction to which it points and to its destination designated by the legislation. It can not be deflected, unless there are physical obstructions which make it necessary, so as to reach the point in the most direct line.

Local self-government is guaranteed under our political system, in or out of a municipality, and the municipal organization as such has no significance as an organization for the preservation of vested political rights. In European countries franchises and privileges to a municipality are secured by contract between lord and dependant; with us it is a creation of positive law, and in furtherance of the general administration of the State, it is subject to legislative will. No vested right can be acquired by a municipal organization by its own act, by the consent of another to said act, or by opposition thereto, as against the paramount authority of the State.

Mayor and City Council vs. Police Jury, p. 1061.

The Post Office Department, whenever a subcontractor for conveyance of the mails abandons his contract, may employ temporary service on the route.

Upon the return of the contractor, from whom the subcontractor held, that department, may reinstate the contractor.

Without the consent of that department, the subcontractor can not be reinstated by the contractor.

The general government has control of all contracts and subcontracts; they are governed by special regulations, and the laws applying to other contracts, regarding the placing in default, do not apply to these government contracts.

The subcontractor had no absolute right to reinstatement by an agreement with the one in charge of the temporary service to carry the mail.

The subcontractor having abandoned his contract, although he subsequently returned to the service prior to notice to the con-

LAWS—Continued.

tractor of his abandonment, he could not continue in the service, even with the consent of the contractor, without the approval of the Post Office Department.

Logan et al. vs. Woodlief, p. 1142.

Courts can not, on the theory of mischief intended to be prohibited, enlarge statutes beyond the fair significance of the language employed, but a statute must have a construction commensurate with its manifest object.

State vs. Desforges, p. 1168.

The provision in our treaty with France, adopting that in our treaty with Belgium, conferring on the delegate appointed by the French consul authority to represent, until they send their powers, French citizens, heirs of succession opened here, is a provision relating to a subject within the treaty-making power, and must prevail if in conflict with a State Law. Constitution United States, Art. 6, par. 2; 1 Kent's Com. 165; *Ware vs. Hilton*, 8 Dallas, 109; *Provost vs. Grenaux*, 19 How. 1; 100 U. S. 483; 138 U. S. 264, 266; Treaty with France, 1853, 10 Stat. 999, Sec. 12; Treaty with Belgium of 1880, Art. XV.

The effect of such provision is to remove any necessity for the appointment by our courts of an attorney to represent such French heirs, and to that extent all that the case requires to be determined, the provision is maintained. See Civil Code, Art. 1210; 18 La. 78; 15 La. 527.

Succession of Rabasse, p. 1453.

The laws of a sister State must be proved as facts, and the foreclosure of a mortgage legal under the laws of the *situs* of the realty.

Roehl vs. Porteous, p. 1588.

Under our system of government it was certainly never intended by its founders that an executive officer should nullify a law by neglecting or refusing to act under it.

State ex rel. Banking Co. vs. Auditor, p. 1679.

LEASE OF STATE PENITENTIARY.

On renewing the contract in 1870 a rental was substituted to half the proceeds, provided under the Act of 1868, and the lessees

LEASE OF STATE PENITENTIARY—Continued.

again bound themselves to pay the officers, including the members of the Board of Control, the chaplains and the clerk.

At the second and last renewal of the contract in 1890 the lessees bound themselves to pay the rental stipulated each year of the lease.

The whole question is as to the meaning of the word "net," whether "net" to the lessee or to the State.

The court decides that it gives emphasis to the condition, that the lessor is to receive the amount stipulated "net," and not after deducting amounts paid to the members of the Board of Control, chaplains and clerk, officers whose services were needful to all parties in carrying out the terms and conditions of the contract.

State vs. James, p. 178.

LEGACIES.

The word "deemed" used in Art. 1641, Civil Code, simply means that no interpretation unfavorable to the creditor shall be placed upon the testament by the fact alone of the legacy to the creditor. It is a question of interpretation whether the testator intended the legacy to be in satisfaction of the debt. Some mention must be made in the testament of the debt and the testator's intention must be gathered from the testament whether he intended the legacy to be in satisfaction of the debt.

Succession of Jackson, p. 1089.

Neither the heir nor the executor is bound to pay the mortgage debt placed by the testator on the thing bequeathed, i. e. the special mortgage, unless that payment by the heir or executor is directed by the will. Civil Code, Arts. 1638, 1441, 1442, 1443, 1444; 3 An. 175; 34 An. 709; 43 An. 144.

Succession of Rabasse, p. 1126.

LEGITIMATION.

Where a natural father in a notarial act in which he acknowledged certain persons as his children, declared that in so doing, it was his intention to "legitimate" them, proceeds at once before the same notary and the same witnesses to make his will, in which he makes special legacies to these children, referring to them as his "acknowledged children," and after having done so, divides

LEGITIMATION—Continued.

the residue of his estate into twelve parts and bequeaths each of the parts to certain nephews and nieces, who are mentioned as his heirs, the two acts may be read together as a continuing single transaction, with a view of ascertaining in what sense the word "legitimate" was used, it being susceptible of two meanings.

Behind the question of legitimation *vel non*, lies the question whether by legitimation by notarial act, natural children become "forced heirs" of the father.

Marionneaux vs. Testamentary Executor, p. 948.

LESION.

The thing sold is regarded in its entirety in estimating its value in relation to the price. Therefore it is error to exclude evidence as to the diminution of the number of acres sold in a suit to set aside the sale for this account. In such a case the rules of setting aside and annulling a sale on account of lesion do not apply.

Northrup vs. Sullivan et al., p. 715.

The intrinsic value of the land at the time of sale, and the nature of the title, should be examined and inquired into, as matters put expressly at issue in an action for rescission on account of lesion. 16 La. 380.

In a sale of a precarious title to land, without warranty. it is a proper subject of inquiry what were the vendor's pretensions worth, rather than what was the intrinsic value of the land. In a sale of land acquired at tax title and again sold by the purchaser, the vendee assuming all taxes due, and some of which were not paid by the vendor, if the amount of the taxes assumed, added to the price, exceed the limit that would justify the action for lesion, the plaintiff can not recover. The value of the land must be fixed at the time of the sale, and within fixed limits. If the witnesses state the land was worth from one thousand to twelve hundred or fifteen hundred dollars, the fixed amount of one thousand dollars will be taken as its true value. The amounts above this are conjectural and speculative.

Martin vs. Delaney, p. 719.

LIBEL.

An amended answer which sets out the facts relied upon as justification is allowable in an action for libel.

When the judge is requested to charge the jury in a series of instructions, tendered *in globo*, as one charge, and he declines to give the instructions, the party tendering them should designate the particular instruction rejected to which he excepts. When the charges so tendered are more abstract propositions of law, without any particular bearing on the case, and some more specifically direct the attention of the jury to particular facts, and others embrace matters fully covered in the general charge, the trial judge ruled properly in rejecting the entire charge so requested.

When the occasion exists, and the allegations are pertinent to the issues presented, no libel is charged. But if the occasion does not exist, and the allegations constituting the alleged libel are gratuitous defamation of plaintiff's character, responsibility ensues. Belief from information excuses no one for libeling another.

When the facts furnished by a client to his attorney are misleading and defamatory of character, and their incorporation into the petition are foreign to the object and purposes of the suit, the client is responsible in damages.

When it appears that the libel complained of was not committed with evil intent, malice may be inferred from the nature of the charge made.

Members of a city council are not subject to suit in their official or individual capacity, because they voted to repeal an ordinance conferring certain rights upon a corporation, when the repealing ordinance is based upon the fact that the corporation had failed to comply with the conditions imposed upon it.

Wimbish vs. Hamilton, p. 246.

Reports of proceedings and transactions of State Legislatures and their committees and of the town councils are privileged under certain conditions. The principle applies also to the committees of the council in proceedings in open meetings pertinent to any inquiry or investigation properly pending or proposed before them.

Meteyé vs. Times-Democrat Publishing Co., p. 824.

LIBEL—Continued.

The distinction does not exist in the jurisprudence of Louisiana between words which are actionable in themselves without proof of special damage and words actionable only with reference to some actual consequential damage.

Any words written or spoken, which are calculated to injure another, may be the foundation of a suit for slander or libel.

Whenever words have the slanderous meaning alleged, not by their own intrinsic force, but by reason of some extraneous fact, this fact must be averred in traversable form.

Where a letter is written to a party containing the alleged slanderous words it is only on the trial on the merits that it can be shown whether or not the defendant's letter was in confidence, and communicated facts in good faith, which he believed were true, in order to protect the party to whom they were communicated, and whether the privilege resulting from such communication was forfeited by the unnecessary publication of the communication to other parties not interested.

Fellman vs. Dreyfous, p. 907.

LICENSES.

Shows and exhibitions, free of any charge or contribution of any kind, do not owe licenses.

The outside free shows, such as "Punch and Judy," "Balloon Ascensions" and "Processions," to attract the crowd to the performance, where an entrance fee is charged, are included within the license of the latter.

State vs. Lundie & Riggs, p. 1596.

LIFE INSURANCE.

The mere fact that a policy has been made "payable to the assured, his executors, administrators or assigns," does not authorize an insurance company to insist that the succession of the deceased policy holder should be placed in the hands of an administrator in order to make payment to him, when the heirs have been placed in possession by order of court, unless special circumstances shown, which would make a payment to the heirs dangerous.

A receipt from the major heirs, and the tutor of the minor heirs, would ordinarily protect the debtor of a succession when the heirs have been, by orders of court, placed in possession.

Pratt et al. vs. Life Insurance Co., p. 855.

LIFE INSURANCE—Continued.

A policy of life insurance made payable to the wife and children of the assured inures to his surviving widow and to his children in equal portions, share and share alike.

Tutorship of Crane et al., p. 896.

LOCAL OPTION.

Whenever an election is held under and in conformity with the provisions of Act 76 of 1884, relative to the granting or withholding of licenses for the sale of intoxicating liquors, the majority of votes cast in the parish, if an election has been held for a whole parish, shall be against granting licenses for the sale of intoxicating liquors, said vote or decision shall govern and control the action of any ward, incorporated town, or city within the limits of said parish as fully and completely as if said election had been held by authority of said ward, town or city.

Garrett, Blanks et al. vs. Mayor et al., p. 618.

MALICIOUS PROSECUTION.

In a suit to recover damages for an alleged malicious prosecution, the findings of facts by two juries must have some weight.

The burden is on the plaintiff to prove both the want of probable cause for the prosecution against him and malice on the part of the defendant.

The facts from which malice is found ought to be such as to satisfy a reasonable mind that the defendant had no ground to originate the prosecution but his desire to injure the accused.

The defendant sought, received and acted upon the advice of counsel. This affords strong evidence that the prosecution was entered into in good faith and without malice.

Womack vs. Fudikar, p. 83.

While to constitute the false pretence against an accused for obtaining money under false pretences, the pretence must relate to past events or existing facts, the same limitation and definition as to state of facts does not always prevail when the suit is for damages for an alleged prosecution.

There is high authority in support of the position that the prosecutor may act upon appearance, and if the apparent facts are such that a discreet and prudent person would be led to the belief

MALICIOUS PROSECUTION—Continued.

that the accused had committed a crime, he will not be liable in a malicious prosecution, although it may turn out that the accused was innocent. 8 Otto, p. 187; Greenleaf, Vol. 2, p. 415, 10th Ed. *Id.*, p. 84.

A plaintiff can not maintain an action for the malicious prosecution of a civil suit until after the legal termination in his favor of the suit complained of.

In addition, the allegations complained of, even if the suit had been finally decided in plaintiff's favor, do not recommend themselves as having given cause for action in damages.

Davis vs. Stuart et al., p. 378.

In order that a plaintiff may maintain an action for malicious prosecution, three things must concur:

1. The suit must have terminated, after trial of its merits, in favor of the accused.
2. The motive must have been malicious.
3. The suit must have been instituted without any probable cause.

The discharge of the plaintiff by the committing magistrate is *prima facie* evidence of the want of probable cause, and the burden of proof is shifted on the defendant.

Want of probable cause is presumptive evidence of malice.

Brown vs. Vittur, p. 607.

MANDAMUS.

Mandamus does not lie unless the character of the act is ministerial and imposed by law. The legislative will has withdrawn from the Register of the Land Office the authority to sell the property; he can not treat the statute as an absolute nullity. The lands are held by a corporation organized to carry into effect public improvements. The questions involved are disputed and require legal controversy for their settlement contradictorily with parties in interest. Courts will not, in a *mandamus* proceeding, undertake to decide collateral disputed questions without giving interested parties opportunity to be heard.

State ex rel. Goodloe vs. Land Office, p. 569.

See Supreme Court.

MARRIAGE.

Where a marriage duly solemnized is sought to be annulled on the ground that the consent given to it by one of the spouses was procured by violence and threats, the *status* of the parties before the court for the time being is that of husband and wife, and neither is a competent witness in the suit. For the same reason both parties, though minors at the time of the celebration of the marriage, are authorized to stand in judgment without the intervention of tutors. The mother of the plaintiff has no personal interest in the suit, for even if her consent to the marriage had been extorted, that fact would not invalidate it. *Lacoste et al. vs. Guidroz et al.*, p. 295.

A marriage the consent to which was produced under the influence of error, violence or threats is not absolutely null—it is not void, but voidable.

Where a husband seeks to annul his marriage on the ground that his consent thereto had been procured by violence and by threats of criminal prosecution for a crime he had not committed, and the evidence shows that affidavit and prosecution were entirely prospective and looked evidently to a charge under Act No. 134 of 1890, or under Sec. 787 of the Revised Statutes, and that at the time of the celebration of the marriage no violence or threats were brought to bear on him, but that he apparently gave free verbal consent to the marriage and signed the marriage certificate, the court will hold the plaintiff to proof, that in order to obtain his assent to the marriage mere forms of law were about to be used to cover coercive proceedings for an unjust and illegal cause. Threats of any measure authorized by law and the circumstances of the case would not invalidate the contract.

Engagements made through error, violence, fraud or menace are not absolutely null, but are voidable by the parties who have contracted under the influence of such error, violence or menace. When, therefore, it is charged by one of the parties to a marriage duly celebrated and duly evidenced by marriage certificate, that his consent thereto was given under the influence of fear and threats, that the marriage was a nullity and should be so decreed, his *status* before the court, during the suit, is that of a *husband*, and he is not a competent witness in the case.

MARRIAGE—Continued.

If the threats used to bring about a marriage were threats only of doing that which the party using them had a right to do (threats, for instance, of any measure authorized by law and the circumstances of the case), they would not invalidate the contract, but the mere forms of law to cover coercive proceedings for an unjust and illegal cause would invalidate a contract made under their pressure. *Id.*, p. 296.

MARRIED WOMEN.

Even the married woman who makes a simulated sale of her property, to serve the purposes of her husband, the title of the vendee being recorded, is bound by his sale or mortgage to one acquiring in good faith and for value on the faith of the recorded title.

Thompson vs. Whitbeck and Husband, p. 49.

The suit and judgment of the married woman against her vendee annulling the sale is ineffective to disturb the right of one who before such suit has acquired for value and in good faith a mortgage on the property, granted by the wife's vendee recorded as owner; hence, under the non-alienation clause, such mortgages may foreclose in proceedings against the mortgagor, notwithstanding the judgment annulling the sale to him by the wife and putting her in possession. See effect non-alienation clause. 1 Hennen's Digest, 955, No. 1.

Id., p. 50.

An act importing renunciation by a married woman of her paraphernal rights on the real property of her husband can not operate in favor of a mortgage creditor of her husband, unless same is, evidenced by an authentic act, made in full compliance with the requirements of R. C. C. 129.

A judgment rendered in a suit between a mortgage creditor of the husband and his wife, based upon a compromise of her rights and an abandonment of her title, can not support the plea either of *res adjudicata* or estoppel, in a subsequent litigation with reference to the same subject matter between the same parties, their heirs or assigns.

Lockett, Under-tutor, vs. Trust Co., p. 1280.

MASTER AND SERVANT.

The employer is not responsible for the dangerous state of the employment, if the danger is known to the employee, and the latter has accepted the employment knowing the attendant risks, and having an opportunity of guarding against them.

If the employee received a fatal shock through defects in the appliances left in his care by the employer, and which he was to inspect and keep in good order and condition, there is no ground of action against the employer.

The employee voluntarily assumed the risks of the employment incurred through the defects of such appliances.

Smart vs. Electric Light Co., p. 870.

It is the obligation of the servant to use ordinary care to prevent and avoid injuries. It is his duty to go about his work with his eyes open. He must take ordinary care to learn the dangers which are likely to beset him in the service. He was warned of the danger. The action against the employer is barred by the imprudent acts of the victim of the accident.

Dixon vs. Electric Light Co., p. 1147.

A railroad company is not liable for the language and conduct of one of its foremen to the prejudice and injury to the business of a grocer, of whom the employees of the company are disposed to buy, the functions of the foreman under his employment being to employ and discharge, when necessary, laborers in the service of the company, and his acts and language alleged to have injured the grocer not being within the scope of such functions. Civil Code, Arts. 2317, 2320; 15 La. 169; 18 La. 492; 5 Rob. 118.

Nor in cases where the employer is responsible by reason merely of his relation to the wrongdoer, are vindictive damages allowed.

Graham vs. Railroad Co., p. 1656.

MINORS.

The minor's mortgage operates on the immovable property of the tutor during the entire tutorship.

Lyman vs. Stroudback, p. 71.

No compromise of the claim of a minor by the tutor is valid without the intervention of a family meeting to advise it. C. C., Art. 3072; 15 An. 148.

MINORS—Continued.

The obligation of persons who have acquired minor's property without the forms of law to restore the thing, the fruits and the revenue result, not from an offence, or *quasi* offence, but from a *quasi* contract.

Where the administrator by private sale has illegally disposed of succession property in which minors are interested, an administration sale afterward provoked in order to confirm the title of the purchaser at private sale is null and void, as it is not a *bona fide* proceeding provoked to pay the debts of a succession. Such a sale can only have the effect of destroying competition among bidders for the succession property.

Heirs of Burney vs. Ludeling et als., p. 73.

Minors who have contracted marriage are authorized to stand in judgment in an action to annul the marriage without the intervention of their tutors.

The want of consent of the mother and tutrix of a minor to his marriage is no ground for its annulment.

Lacoste et al. vs. Guidroz et al., p. 295.

This prescription against minors dates from their majority.

Succession of Justus, p. 302.

The share of a minor in the money collected upon a policy payable to the wife and children is not an asset of the community, but of his separate estate; and it does not pass under the surviving widow's usufruct, though it becomes subject to her administration, as tutrix.

In the event it becomes necessary for the protection of the minors' interest in the property of the dissolved community, as well as for the preservation of the widow's usufruct, that the tutrix should use and expend the insurance money in discharge of pressing community debts, she is chargeable with legal interest as on money loaned at interest, from date of use to date of accounting.

Such interest constitutes the revenues of the minors on which the ten per cent. commission of the tutrix is to be calculated.

The expense of an account is at the cost of the emancipated minor.

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Tutorship of Crane, p. 897.

MINORS—Continued.

Services rendered to the grandfather of a minor, in the progress of a litigation, which resulted to the latter's pecuniary benefit, places upon her a legal obligation to compensate the attorney at law who conducted them the *quantum meruit* value of same.

Lea vs. Mrs. Hart, Tutrix, p. 1116.

See Family Meeting.

MORTGAGE—Executory Process.

A person who buys property affected by a recorded mortgage containing the clause *de non alienando* is legally bound and held to know that the holder of the mortgage claim under that clause is entitled, in case of default of payment, to enforce his rights as if the original owner still held the property; no notice need be given him. The fact that a subsequent purchaser may have personally assumed the mortgage does not affect the mortgagee's rights.

The mortgagee may proceed to execute his mortgage either *via ordinaria* or *via executiva*. *Levy vs. Lake*, 43 An. 1035.

Truxillo vs. Delaune et al., p. 10.

Mortgages executed by one who stands on the records as owner can not be disputed by the real owner as against mortgages for value in good faith, acquiring their rights on the good faith of the recorded title. 1 An. 286; 4 An. 84; 45 An. 1085.

Thompson vs. Whitbeck and Husband, p. 49.

ANTICHRESIS.

It is not of the essence though of the nature of the contract of mortgage that the mortgagor should remain in possession. As a clause *to that effect merely*, placed directly in the authentic act of mortgage, would not change a contract of mortgage into one of *antichresis*, a like verbal collateral agreement would not produce such a result. Objection of parol evidence of such a verbal agreement on the ground that it was through such testimony sought to prove an *antichresis*, which can only be evidenced by a writing, was not well taken.

The voluntary cession of his property by a debtor does not impair the obligations of his legal contracts. Where the commission

MORTGAGE—Continued.

merchant of an insolvent planter has a privilege and *statutory pledge* upon a growing crop of sugar and molasses to secure advances which he has made upon the same, he is entitled to have the crop shipped to him for sale according to the stipulations of the contract for supplies. The syndic of the creditors is as much bound to ship the crop as the insolvent himself would have been.

If among the assets of an insolvent there be a thing which has been pledged, the possession of it does not pass to the creditors, being vested in the pledgee. The obligation of the pledge is contractual. It vests in the creditor the right of possession and privilege on the thing pledged. The right of detention being as much a part of the security as the things pledged are part of the guaranty, the creditor can not be deprived of the same by his debtor.

Where, under a verbal agreement with a sugar planter, as part of the general arrangement under which a factor has stipulated to furnish him supplies for a growing crop, a factor himself applied to and obtained from the United States authorities a license as the producer of the crop (giving the bond required in such case), and under such license received from the government (after a cession of his property by the planter) the bounty allowed on such crop, the syndic of the creditors ignore the stipulations of the contract between the parties, that the fund when received shall be applied, as imputed by the factor, to the debts due him by the planter, and require that the bounty be at once turned over and the factor forced (after possession of the same has been shifted from himself to the syndic) to litigate his rights and claims upon it inside of the insolvency in *concurso*, the rights of the creditors must be protected in some other manner.

The government having known and dealt only with the factor, the legal title to the claim for bounty was vested in him, and having been so vested under a contract which, if innominate, was legal as between the parties, the fund derived under the license could only be withdrawn subordinately to compliance with the conditions of the contract.

Webre, Syndic, vs. Beltran & Co., p. 195.

MUNICIPAL CORPORATIONS—Continued.

vegetable matter is not necessarily a nullity and unreasonable. The purpose of the ordinance is within the scope of the legislative power.

The ordinance being in harmony with the general laws of the State, it is not *per se* oppressive.

State vs. Payssan, p. 1029.

The amount placed on the budget for the annual expenses of a municipal corporation, when collected by the taxes levied for such expenses, must be applied to the purposes specified in the budget, and the corporation will be liable for any diversion of such amounts. 36 An. 636.

Funds raised by taxation for such purposes are trust funds, and the prescription of one year will not protect the corporation from liability for the taxes thus collected.

School Directors vs. City, p. 1311.

An ordinance to the extent it may transcend the power vested in the body which passed it, is null and may be taken advantage of by plea or answer to an action to recover the penalty.

The municipal council has the authority, in public interest, to make extensive and varied regulations as to the time, mode and circumstances one shall exercise his right to private property; but without showing cause sufficient an owner can not be divested of his property. *State vs. Payssan*, *ante*, p. 1029, reaffirmed.

State vs. Morris, p. 1660.

See Public and Private Right—Garbage.

NATURAL CHILDREN.

Natural children who claiming to have been legitimated by their father, and thereby made his forced heirs, brought suit to have his will set aside so far as it effected their *legitime*, are not estopped from bringing the action by reason of their having accepted delivery from the testamentary executor of property specially bequeathed them, and having granted the executor a discharge from all liability to them on account of that particular property in an act wherein the existence of the will and its probate is referred to, when they were not parties to the probate proceeding, and knew nothing of the other provisions of the

NATURAL CHILDREN—Continued.

will. There is no inconsistency in a father in the exercise of his power of disposition over the disposal portion of his estate making special legacies and leaving the *legitime* intact. The heirs would have the right to assume that such was the case.

Marionneaux vs. Testamentary Executor, p. 943.

NAVIGABLE WATERS.

The railroad company placing piles in navigable waters to protect the bridge laid under legislative authority must use all necessary protections for the security of commerce, and if, because precautions are not used, a vessel is lost or injured by contact with the pile structures, the company will be responsible. Wood on Nuisances, 5472; 126 U. S. 260; 6 McLean, 70.

The limited liability legislation under certain modifications exempts carriers by water from responsibility from losses due to perils of navigation or any want of care in the management of vessels and incurred without any privity or negligence of the carrier, but extends no protection against a loss caused by the contact of the vessel with the pile structure placed by the carrier in navigable waters without due precautions to guard against accidents. Revised Statutes of the United States, Sec. 4282 *et seq.*; 24 Statutes, 81; 27 Statutes, 445.

Nor does the code or any stipulation in the bill of lading furnish the carrier any protection against such losses. Civil Code, Arts. 2751, 2794; Wheeler on Carriers, Sec. 31 *et seq.*; 17 Wallace, 361.

Darrall vs. Railroad Co., p. 1456.

NEGLIGENCE.

The proof disclosing that a small boy had approached a train, just at the moment that it was about to come to a halt, and was standing so close to one of the steps of the car that a forward movement of the train brought it into contact with a basket on his arm, pulled him down, and caused his leg to be run over and broken, a case of negligence is not made out against the railroad company.

There being no contractual, or even *quasi*-contractual relations between the parties, and the operatives and employes of the company being unaware of the presence of the boy, the occur-

NEGLIGENCE—Continued.

rence must be regarded as an unfortunate accident for which the defendant is not liable in damages.

Whitcomb vs. Railroad Co., p. 225.

Passengers approaching the railroad track they propose to cross must exercise reasonable care to avoid accidents, and when it appears that if there had been such precaution the near approach of the train would have been ascertained, the traveler can not recover damages if, on attempting to cross, he is struck by the locomotive. Beach on Contributory Negligence, Secs. 181, 184.

The mere omission of train signals will not subject the railroad company to damages if the traveler struck by the locomotive attempts to cross the track without observing usual precautions to avoid such accidents.

Least of all will the company be held for damages caused by the locomotive striking the traveler crossing the tracks if the evidence shows the usual signals of the approaching train were given, and which should have been heard and heeded.

Blackwell et al. vs. Railroad Company, p. 268.

One who, in the night-time especially, and of his own choice, walks on the track of a street car, with the full knowledge the car may come at any moment behind him, is bound to use his senses to avoid the car; and if by the exercise of ordinary care he would have been apprised of the advancing cars in ample time to leave the track, and fails to do so, he can not recover damages if run over, it not being practicable, with any reasonable diligence, for the driver to avoid the accident. 1 Harris on Damages by Corporations, Secs. 20, 260; 1 Thompson on Negligence, 449; Schexnaydre case, 46 An. 248.

Smith vs. Railroad Co., p. 883.

Under three years of age a child is *prima facie* incapable of contributory fault.

Although a child may be in a public highway through the fault or negligence of its parents, and so be improperly there, yet if he be injured through the negligence of the defendant he is not precluded from his redress. If the defendant knows that such a person is in the highway, he is bound to a proportionate

NEGLIGENCE—Continued.

degree of watchfulness—to the utmost circumspection. And what would be but ordinary neglect in regard to one whom he had supposed to be a person of full age and capacity, would be gross neglect as to a child, or one known to be incapable of escaping danger.

Barnes vs. Railroad Co., p. 1218.

It is the duty of the driver of a street car, not only to see that the railroad track is clear, but also to exercise constant watchfulness and care for persons who may be approaching the track.

It is a correct charge to a jury to say that a car driver "can be justly charged with negligence only when he fails to observe or do something he ought to have seen or done, and would have noticed or done with ordinary vigilance; when he fails to be prepared for something visible, or, at least, of probable occurrence, or that might be reasonably expected to happen."

Id., p. 1219.

The driver of a tally-ho, laden with passengers to whom the proprietors had hired the vehicle to go to a specified destination and return, in attempting to cross a railroad track comes in collision with a rapidly approaching train, whereby the vehicle is demolished and one of the passengers killed, is guilty of gross carelessness which subjects the proprietors to damages in favor of the deceased passenger's parents.

Unless the passenger undertakes the management and direction of the driver of such public conveyance in some manner, outside of indicating the route he is to travel, and the destination to which he is to take him, he incurs no responsibility to the proprietor for the happening of an accident through the driver's acts, and the passenger's failure to advise the driver does not subject him to the charge of contributory negligence.

Perez et al. vs. Railroad Co. and McMahon & Sons, p. 1391.

A collision of railroad trains brought about by the concurring negligence of two companies will render them liable *in solido* to an injured party.

McDonald vs. Railroad Co., p. 1440.

The liability arising from negligence constituting the offence or quasi

NEGLIGENCE—Continued.

offence is to the injured party, but creates no liability one to the other of those to whom the negligence is imputed, hence if one of the wrongdoers pays the resulting damage, he thereby acquires no right of action against the other, least of all if he has settled with the injured party and been discharged from all liability. Civil Code, Arts. 2315, 2316.

Such payment simply discharges the debt of the party who pays, fixed on him by the judgment, hence gives rise to no contribution from the other alleged wrongdoer, as contribution is on the theory that payment by one has discharged another from whom the contribution is due.

The builder erecting a staging for his workmen will not be liable to a subcontractor—i. e., to do the painting of a building, for the damages he is made to pay arising from the fall of the staging which the workmen of the subcontractor choose to use, there being no contract of the builder to furnish them such staging.

Nor will the builder be responsible for such damages to the subcontractor under the articles of the Code that fix on the master or employer, liability for the acts of his servant. Civil Code, Arts. 2317, 2320.

Sincer vs. Heirs of Bell, p. 1548

It is negligence to go from one car to another while the train is in motion. If a passenger on a train in motion attempts to go from one car to another, and is thrown from the platform by the sudden jerk of the train, the defendant corporation is not responsible. In such a case the defective coupling of the train will not justify a verdict in favor of plaintiff, as the passing from one car to another is the proximate cause of the injury.

Bemiss vs. R. R. Co., p. 1671.

NEW ORLEANS.

In a contract between the City of New Orleans and a contractor, the latter bound himself, at his own expense, to alter an existing market building and to extend the same according to certain plans and specifications, within nine months of the signing of the contract, while the city agreed "to lease to the contractor the said market building as altered and extended" for a period of twenty-five years from the signing of the contract.

NEW ORLEANS—*Continued.*

In the contract it was declared that the buildings were to be used as a public market. The city agreed that during the term of the lease or franchise the contractor should receive for himself all market dues or tolls, and the contractor agreed that at the termination of the lease the buildings should revert to the city without cost, and also agreed to pay and did pay to the city one thousand dollars cash. In the contract it was stipulated that "in the event of failure to perform the work within the delay fixed, no matter from what cause, the contractor specially waived notice of default, agreeing that on failing to comply with his obligations he should be deemed to be in default by the mere act of his failure."

Subsequently to the time fixed for the completion of the building the city passed an ordinance in which, after reciting that the contractor had failed to comply with his obligations, it declared the contract at an end, and repealed the ordinances granting the lease or franchise.

The contractor, not negating the recitals of the ordinance or alleging performance by him of his contract, applied for an injunction restraining the city from interfering with him in the enjoyment of the franchise or for prosecuting or punishing parties who resorted to the market for trading purpose; the old portion of the market building having, in the meantime, been used as a public market. The District Court refused the injunction and the contractor appealed.

Held: The judgment was correct. The thing to be leased was not the existing building, but that building "as altered and extended." The contractor stipulated to bring it *into existence for the purpose of the lease or franchise within nine months*. He did not do so. The city had the right to pass the ordinance, if for nothing else, to fix the fact of the contractor's default, carrying with it its legal consequences. Subsequently to the ordinance an offer by the contractor to complete the building would be too late.

The object on which the franchise was to operate could not thereafter be brought into existence. The contention that the city had not the right "*to declare the contract terminated*" is a pure abstraction. There was no proof that the city had prosecuted or threatened to prosecute parties who resorted to the market.

NEW ORLEANS—Continued.

If the ordinance did not *per se* by its own force terminate the contract as contended for, the contract was, through it, made impossible of execution.

It was not null and void because of the declaration complained of.
Utile per inutile non vitiatur.

Market Company, Ltd., vs. City, p. 205.

DRAINAGE.

The city of New Orleans having, during the existence of the New Basin and Shell Road Corporation, drained from the Melpomene Canal into the New Basin, at a designated point, and this drainage having been continued by the Legislature on the State's acquiring said canal, the Board of Control of said canal has no authority to close the culvert through which the drainage entered the canal. Having closed the culvert the Board of Control must offer equal facilities for drainage into the canal. The State has the power to prevent any drainage into the canal, and the Board of Control can restore the old culvert. Until it does so, it can not interfere with the drainage into the canal through other practical channels, particularly where the board has, to a certain extent, designated this other practical channel.

City vs. Board of Control, p. 241.

NOTARIES PUBLIC.

Section 2504, R. S., requires notaries to file their bonds with the Auditor of Public Accounts; but said section does not provide for the vacancy of the office on the failure to file the bond with the Auditor.

The failure to record the bond in the Auditor's office may be a just cause for the suspension of the notary under Sec. 2505, R. S.

Notaries continue to act so long as they renew their bonds every five years, unless suspended by the Supreme Court. R. S. 2506.

THE NOTARY'S DECLARATION IN THE BODY OF THE WILL.—"The above and foregoing was written by me, said notary, as dictated by the testator, the said Donald Monroe, in the presence and hearing of the said George W. Kendall, F. Dodd and E. Martin, and then read by me, said notary, to the testator in the presence and hearing of said witnesses, all at one and the same time, without interruption and without turning aside to other acts,"

NOTARIES PUBLIC—Continued.

is a compliance with Art. 1578, Civil Code, as it expressly mentions all the essentials to the validity of the will required by said article.

Monroe et als. vs. Administrator et als., p. 155.

NUISANCE.

Where a particular thing is declared a nuisance by a municipal corporation, it is not necessary, nor is it required that the ordinance shall provide for an investigation as to the nature of the nuisance before an attempt is made to execute the ordinance, as this is a matter for judicial inquiry.

The Act No. 16 of 1839 conferred full and complete power upon the corporation of New Iberia to enact all needful police regulations, including those to regulate the storage of combustible and inflammatory substances.

The regulation of the storage of petroleum and other inflammatory substances is not the taking of private property without due process of law, nor is it in restraint of trade.

Oil Co. vs. Mayor, p. 863.

State and city business licenses furnish no defence against a suit to abate nuisances arising from the unauthorized uses made of the licenses. Wood on Nuisances, Secs. 743, 746, 751.

The uses of such licenses that congregate crowds of disreputable people; lead to drunkenness, debauchery, noises and midnight arrests, preventing sleep, and presents to the view of neighbors and to the public lewd women, indecently attired and lascivious behavior of men and women, create nuisances of the most serious character, affecting the residents of the neighborhood. Wood on Nuisances, Secs. 1, 15, 38, 39, 542, 801.

Koehl et al. vs. Schoenhausen, p. 1316.

Such nuisances disturbing individuals in the enjoyment of their property, injurious to their rights and interfering with their peace and comfort, may be abated at the suit of the parties affected, although the nuisances prohibited by law and the ordinance are within the police power to suppress. Wood on Nuisances, Secs. 541, 542, 614, 507; 36 An. 162.

The writ of injunction in such cases, prohibiting the evils complained of, is authorized to be enforced by the penalty for dis-

NUISANCE—Continued.

bedience imposed on the defendant, whenever and as often as the nuisances are produced arising from the unauthorized uses he chooses to make of his licenses. Wood on Nuisances, Secs. 619, 621, 645, 647; Code of Practice, Arts. 296, 308; Schoenhansen Applying for *Certiorari*, 47 An. Ante, 696.

Id., p. 1317.

OBLIGATIONS.

Obligations *in solido* are not presumed. They must be expressly stipulated, unless they take place of right by virtue of some provision of law. 2095 C. C.

Joint purchasers of property, unless there is an express stipulation to that effect, can not be held liable *in solido* for the purchase price of the property. 1 An. 432; 18 An. 291; 13 La. 447; 3 Rob. 256.

Heirs of Burney vs. Ludeling et al., p. 74.

One of the obligors having promised the mortgagee that he would pay the amount of their indebtedness in the event of the sale of the property mortgaged, whatever the property would bring, he is not concluded so as to prevent him from recovering one-half of the difference between the purchase price and the amount of the indebtedness, the proof being that, in promising to pay, he stipulated in good faith for the proceeds of the sale of the property to be credited on their indebtedness, and that after that credit he would pay the remainder of the obligation to the mortgagee.

Roehl vs. Porteous, p. 1582.

See Sale.

OFFICE—RIGHT TO.

When a party seeks, through the arm of the judiciary, to direct or control or regulate the performance of public duties by officers of another department of the government, pleadings of an exceedingly specific character, showing exceptionally strong facts in aid of the relief asked, must be presented to a court to justify its assuming jurisdiction.

Mere conclusions of law, or conclusion of ultimate facts, will not suffice; nor should the pleader take anything by failing to bring

OFFICE—Continued.

to the knowledge of the court the condition of affairs which he must be aware will eventually be advanced in defence.

This court takes judicial notice of Act No. 125 of 1877, extra session, and that the same has not been repealed.

He who has qualified as a statute officer, in an office, the appointment to which is vested in the Governor, is entitled *prima facie* to possession of the office.

State ex rel. Kuhlman vs. Judge, p. 53.

OFFICE—REMOVAL FROM.

Writ of injunction issued on *ex parte* proceedings of one claiming to be in possession of the office of police juror and a member of the Board of Supervisors of Elections. As a matter of fact the petitioner had been removed from office by the Governor prior to his alleged appointment as supervisor, and was without power or authority to act, either as a police juror or as a member of the Board of Supervisors.

State ex rel. Keller vs. Judge, p. 61.

State ex rel. Picard vs. Judge, p. 65.

The prescription of two and three years, applicable to acts of malfeasance and non-feasance of sheriffs (Revised Statutes, Sec. 2816), has no application to proceedings of his removal under Arts. 196 and 201 of the Constitution.

Specifications and proof of failure to make arrests and execute process, nor exhibiting corruption, gross neglect or inefficiency, will not authorize the removal of a sheriff under Arts. 196 and 201 of the Constitution.

Nor will a return and sheriff's deed, agreed by the attorneys to be nominal, authorize the removal of the sheriff because they contain a recital that the price of an adjudication was paid, inserted to show compliance with the adjudication, the deed being intended merely to be a prelude to a subsequent act to a purchaser, who by agreement is to furnish notes to be delivered to the seizing creditor.

But the record showing that the attorney of the seizing creditor believed that a part of the adjudication was to be paid to the sheriff, it was negligence in the sheriff in not requiring or seeking instructions from the attorney of the seizing creditor before reciting in his return that the full amount of the adjudication was

OFFICE—Continued.

paid, and the court, on admonition in this respect, holds that, under the peculiar circumstances of this case, the sheriff should not be punished with deprivation of his office.

Though a sheriff be guilty of a technical disregard of the precepts of law governing his official conduct, he can not be removed from office if his acts were done in pursuance of advice of counsel in good faith, intending no wrong.

State ex rel. District Attorney et als. vs. Sheriff, p. 184.

Sheriffs are required to enter on the book provided for the purpose all taxes and licenses, with the interest thereon collected; the entries of the payment of the taxes and interest are to be contemporaneous with the dates of collection; from this book the Parish Treasurer is to transcribe in his book the taxes collected; the book is to be opened at all times to public inspection, and the sheriff is also required to pay over to the Parish Treasurer in the first week of each month all collection of taxes and license; these provisions, designed to guard the public funds from loss by accident or defalcation, define functions of the highest importance to the public, and serious violation of such duties by the sheriff furnish the basis to remove him from office. Act No. 85 of 1888, Secs. 76 and 86; Act No. 84 of 1892; Constitution, Arts. 196, 201.

That the sheriff finally pays over the taxes and licenses collected by him will not excuse the breaches of official duties, in not keeping his book as prescribed by the law, in respect to his receipt of public funds, and in not making settlement at the periods designated by the statute; to hold that settlement at last is to be accepted as the equivalent of such public duties not performed would be to make public funds dependent for their safety on the ability of the sheriff to settle finally, and would displace the statutory requirements of faithful accounts and prompt settlement, which, if observed, would effectually protect the public interests.

State ex rel. District Attorney vs. Sheriff and Tax Collector, p. 278.

Executive officers of the State government have no authority to decline the performance of purely ministerial duties which are

OFFICE—Continued.

imposed upon them by a law on the ground that it contravenes the Constitution.

State ex rel. Banking Co. vs. Auditor, p. 1679.

See Register Land Office.

OWNERSHIP.

The party in possession is the only one liable for rents, fruits and revenues.

The true owner of a property can avail himself of the judgment against the warrantor.

Heirs of Burney vs. Ludeling, p. 1484.

PARTITION.

The auctioneer who makes a partition sale may execute the act and receive the price.

Johnson et al. vs. Barkley et al., p. 98.

The suit for partition calls on defendants to urge all defences on which they propose to rely, and the decree for the partition concludes them from any attack on the plaintiff's title, the basis of their demand for the partition; hence, an injunction by defendants to stop the execution of the partition decree, the injunction obtained on the ground that the plaintiff had no title to demand the partition, will be dissolved. Civil Code, Arts. 1380, 2286.

Chopin et als. vs. Bank, p. 660.

The action for a partition of immovable property being a real action, the heirs should be made parties defendant to the suit. As the partition has not yet been made, compliance with Art. 123, C. P., and Arts. 1808 and 1322 is required.

An attorney for absent heirs can not stand in judgment in such a suit.

Gibbs vs. Executor, p. 766.

In case a judicial sale of real property is made to effect a partition by licitation, between co-heirs, some of whom are minors, a title free of incumbrance will pass to a purchaser upon his paying the whole of the purchase price into the registry of the court, there to remain, under the control of the court, until the

PARTITION—Continued.

share of the proceeds coming to the minors shall have been legally re-invested, and the tutrix shall have furnished satisfactory security, in lieu of the legal mortgage of the minors, on her interest in the property sold.

Widow Koehl vs. Solari, p. 890.

PARTNERSHIP.

Entries in partnership books bind the partners, and on the issue whether immovable property has been acquired for the partnership, such entries are admissible. 2 Lindsey on Partnership, 537; Armistead and another vs. Spring, 1 Rob. 567.

Calder & Co. vs. Creditors, p. 346.

Whether the immovable is bought in the partnership name, or for it by one of the partners, they become joint owners, as the partnership can not own immovable property. C. C., Arts. 2825, 2836; 1 N. S. 295; 3 La. 496; 10 La. 420; 3 Rob. 256; 1 An. 434; 5 An. 582.

Hence, being joint owners, one partner can not dispose of the shares of his co-partner in such immovable; all must concur to make title, and hence a cession by one partner does not pass to the syndic the shares of his co-partner in immovable property. *Ibid.*; 1 An. 434; 4 An. 56; 9 Rob. 372.

But if the immovable is acquired for the partnership, each partner has the right in the appropriate proceeding to insist the property shall be applied to pay partnership debts, and, in the event of a cession by one of the partners, that right passes to the syndic. Story on Partnership, Secs. 97, 98, 360, 361; Civil Code, Art. 2823. *Case vs. Beauregard*, 99 U. S. 128.

Id.

Where, after a commercial partnership (created by written articles of partnership for a fixed time) has expired by limitation, the business is continued for years precisely as before, such conduct evidences reciprocal consent to the creation of a "partnership" between the parties, and the partners are bound *inter se* and to third persons as if articles had been executed, and the rules governing "partnership at will" control as to the dissolution of the partnership. The partnership is not one resting for its existence

PARTNERSHIP—Continued.

from day to day by force of reiterated affirmative daily consent, but is a continuing partnership, subject to termination only after notice, and under the rules of law governing the dissolution of partnerships. Until formally or legally dissolved it continues.

A partnership, even at will, does not, by the weakening of the mental faculties of one of its members, become *ipso facto*, and, prior to interdiction, dissolved even between the partners, and still less as to the customers of the firm. Some affirmative step has to be taken to bring about a dissolution, and the customers of the firm are entitled to notice.

It is no more the duty of the customers of a partnership at will to keep advised at their peril as to the mental condition of all the members of a firm than it is for those of a partnership with a fixed period of life. They have the same right in one case as in the other to assume, until notified to the contrary by the parties in interest, that the partnership continues.

There is no necessity for the consent of all the members of a firm to partnership contracts. The partnership being distinct from the individuals who compose it, the consent of any one of the partners is the consent of the firm. A partnership contract, made by one of the partners of sound mind, is not affected by weakness of mind of the other partner, especially where the other contracting party is ignorant of the latter fact.

If the interest of one of two partners is jeopardized by the gradual impairment of his mental faculties, his presumptive heirs have sufficient legal interest to take the step necessary for his protection.

Jurgen vs. Ittman et al., p. 367.

PASSENGERS ON RAILROAD.

Railroad trains should be stopped to afford passengers necessary time to get off at their destinations; and if the passenger is injured in attempting, under the directions of the conductor, to alight at his station, from the moving train, the railroad company will be responsible for the injuries. 2 Harris, Damages by Corporations, Sec. 596; *Lehman vs. Railroad*, 37 An. 705; *Odom vs. Railroad Company*, 45 An. 1204.

Jones vs. Railroad Co., p. 383.

PASSENGERS ON RAILROAD—Continued.

The passenger on the railroad train is entitled to be carried to his destination; if carried beyond and made to leave the train, under the compulsion of the orders of the train officials, he is entitled to damages.

Dave vs. Railroad & Steamship Co., p. 576.

This case is distinguished from those in which it is held that the passenger on a railroad, carried beyond his station, can not recover damages caused by jumping from a moving train. 9 An. 441; 41 An. 796; 37 An. 708; 45 An. 1201.

The passenger on a railroad train, with a ticket for a station at which it is customary for the train not to stop, but to slow its movement, so as to allow passengers to alight, will be entitled to damages if, called to the platform by the announcement of the station, he is thrown from the steps of the car and injured, his fall being caused by the sudden increase of the speed of the train, when it should have been slowed or stopped. Wharton on Negligence, Secs. 371, 375, 377.

Nor will it make any difference in the liability of the railroad company, that the passenger is thus thrown from the car on the side opposite to his station; the train having passed the station without affording him an opportunity to alight, and he having crossed to the other side, under the reasonable expectation the train would be slowed at his destination a few feet beyond the station.

Bradshear vs. Railroad Co., p. 735

PAYMENT FOR SERVICES.

When there was no contract for compensation, the law gives plaintiffs an action to recover a reasonable compensation for services rendered the deceased, in his lifetime, under the circumstances developed by the evidence in this case.

Dauenhauer and Husband vs. Succession of Brown, p. 143.

A party having undertaken, on behalf of a foreign corporation, to effect sale of an ice machine and accompanying paraphernalia to persons domiciled in this State, for a designated and fixed commission on the amount of the sale effected, payable when the plant is turned over to the purchaser and settled for at a given

PAYMENT FOR SERVICES—Continued

date, is entitled to payment of such commissions at that date, notwithstanding litigation arises between the contracting parties with reference to the vendor's fulfilment of its contract, which operates a delay in settlement between them.

Gravelly vs. Ice Machine Company, p. 389.

PLEADING AND PRACTICE.

This court will not remand a cause to have a sheriff's return corrected, when the statement of the District Judge as to the facts of a service are not disputed.

State vs. Dixon, p. 1.

The averment of the petition being that a municipal corporation had annually levied and collected a tax for school purposes, and thereafter budgeted and appropriated same for those purposes; and during a long series of years made disbursements therefrom for such purposes; but subsequently declined to make further disbursements therefor on the ground that the municipality had no power under its charter to levy such a tax, and the further averment being that the Parish Board of School Directors are entitled to demand of and to receive from the municipality the funds thus actually levied, collected and deposited in the treasury—such petition discloses a cause of action.

School Directors vs. City, p. 21.

The plaintiff in the petitory action alleging title under a sheriff's deed, and referring to the suit under the execution in which the sale was made, is entitled to offer in evidence the mortgage act, the basis of the judgment in such suit, and the sheriff's return on the execution, the testimony tending to maintain the title pleaded, and admissible on the further ground that plaintiff averring ownership is not to anticipate by his pleadings the title defendant may allege, and is entitled to offer testimony to repel such title as defendant may advance. 4 N. S. 277; 10 An. 528; 12 An. 795; 12 Rob. 648; 11 An. 546; 2 Hennen's Digest, 1145, No. 1.

Mortgages executed by one who stands on the records as owner can not be disputed by the real owner as against mortgagees for

PLEADING AND PRACTICE—Continued.

value in good faith, acquiring their rights on the good faith of the recorded title. 1 An. 236; 4 An. 84; 45 An. 1085; 2 Hen-
nen's Digest, 1373, No. 1.

Even the married woman who makes a simulated sale of her prop-
erty, to serve the purposes of her husband, the title of the ven-
dee being recorded, is bound by his sale or mortgage to one ac-
quiring in good faith and for value on the faith of the recorded
title. *Ibid.*, 45 An. 1045.

The suit and judgment of the married woman against her vendee
annulling the sale is ineffective to disturb the right of one who
before such suit has acquired for value and in good faith a mort-
gage on the property, granted by the wife's vendee recorded as
owner; hence, under the non-alienation clause, such mort-
gagee may foreclose in proceedings against the mortgagor, not-
withstanding the judgment annulling the sale to him by the wife
and putting her in possession.

Thompson vs. Whitbeck and Husband, p. 50.

When a party seeks, through the arm of the judiciary, to direct or
control or regulate the performance of public duties by officers
of another department of the government, pleadings of an ex-
ceedingly specific character, showing exceptionally strong facts
in aid of the relief asked, must be presented to a court to jus-
tify its assuming jurisdiction.

Mere conclusions of law, or conclusion of ultimate facts, will not
suffice; nor should the pleader take anything by failing to bring
to the knowledge of the court the condition of affairs which he
must be aware will eventually be advanced in defence.

State ex rel. Kuhlman vs. Judge, p. 53.

A defendant, whose judgment on a reconventional demand has been
reversed and the case remanded for a new trial thereof, may
discontinue same in the lower court, final judgment having been
rendered against the plaintiff on the principal demand, and that
judgment having been affirmed on appeal to this court.

The husband having brought suit against his wife for a divorce, and
the wife having reconvened for a separation from bed and board;
judgment having been rendered in favor of the defendant and
against the plaintiff in the lower court, but same having been

PLEADING AND PRACTICE—Continued.

reversed and remanded by this court, in respect to the defendant's reconventional demand alone; and said reconventional demand having been thereafter voluntarily discontinued by the defendant. *Held*, that in this situation of the case the marriage was intact and the community undissolved, and that the costs engendered were a tax against the community.

Suberville, Husband, vs. Adams, Wife, p. 68.

Where parties have executed promissory notes, and they have been pledged by the holder, it is improper to join in the same suit, as defendants, the maker of the notes and the debtor for whose debt they were pledged.

Forstall vs. Commercial Association, Ltd., p. 105.

When a person claims employment for one year under a contract and fails to make out his case, this court will not award judgment, by way of remuneration, for services rendered for a portion of time embraced within the year of the alleged contract. Plaintiff has not sued on a *quantum meruit*.

Burton vs. Behan & Zuberbier, p. 117.

In a petitory action where the plaintiff's title rests on a judgment, the defendant can attack the same. After a final judgment has been rendered, it is too late, in subsequent litigation between the parties to the original suit, to supply omissions of evidence and pleas which should have been urged in the first instance.

Fleitas, Wife, vs. Meraux, p. 232.

The delay for filing the exception or answer of the defendant is at an end ten days after citation, not counting the day on which citation is served. C. P., Arts. 180, 310; 25 An. 186.

Font et als. vs. Land Improvement Co., p. 272.

The prematurity of an action may be waived, and that plea must be interposed in order that the court may be enabled to decide as to its maturity *vel non*. *Landwirth vs. Chaplin*, p. 388.

In confirming a default in such case no jury is necessary, Art. 313 of the Code of Practice not applying to such confirmation.

Nicholls vs. Bienvenu et als., p. 356

PLEADING AND PRACTICE—Continued.

Plaintiff in bringing a petitory action is not necessarily forced to cumulate therewith an action of nullity to set aside judicial proceedings in which his title has been apparently divested. He has, at his risk, the right to allege such proceedings to be absolute nullities, and go to trial on that issue.

Callahan vs. Fluker, p. 427.

Where plaintiff in his petition in a petitory action alludes, but only incidentally, to certain judicial proceedings, and then only as being absolutely null, this simple reference does not control the character of the action or determine the jurisdiction.

Id., p. 428.

MOTION SEASONABLY MADE.—The production of a merchant's books may be ordered on motion after the trial has begun, if no delay in the trial is thereby occasioned.

The defendant could be interrogated regarding the part taken by alleged preferred creditors for the purpose of showing that they participated in the fraudulent concealment of his books. If true, it would not be an irrelevant circumstance in sustaining the charge that there was collusion on the part of those thus participating.

Wolff vs. Wolff, p. 548.

Where upon suit being instituted for the recovery of damages alleged to have been incurred through writs of sequestration and attachment illegally issued, it is shown that by judgment standing unreversed, although the attachment was dissolved the sequestration was maintained, that the two writs were simultaneously executed and covered the same property, and that the seizure under both writs was released at the same time under a forthcoming bond, there is no basis for a judgment for the plaintiff—the illegality of the attachment is met at every step by the legality of the sequestration. Plaintiff, however, is entitled to attorney's fees for setting aside the attachment.

Banking Co. vs. Lumber Co., p. 582.

It is no ground for the dismissal of the suit that the plaintiff fails to annex documents to the petition. The defendant has the right to demand an exhibit of the documents, and on the failure

PLEADING AND PRACTICE—Continued.

of plaintiff to produce them he will not be required to answer the demand of plaintiff, and the dismissal of the suit will be the penalty for plaintiff's failure to produce.

Hewitt vs. Williams, p. 742.

Where interrogatories on facts and articles, propounded to a defendant in aid of the special issue involved in a particular suit, are broadened out beyond the strict necessities of that issue, the defendant can not avail himself of his answers thereto in another suit involving new issues.

Godwin vs. Neustadt, p. 842.

Under the prayer for general relief the date from which interest begins to run may be considered as alleged.

Vincent vs. Phillip, p. 1288.

Where a witness was asked by defendant to state the substance of a document, and the plaintiff objects, which objection is withdrawn, and then the defendant withdraws the question asked for the substance of the document, it is too late, after withdrawing the question, to ask for time to get a copy of the document.

A party can not sue the defendant on instalments growing out of the same contract when the whole amount was due when suit was first brought. He is presumed to have all that he was entitled to in the first demand.

Construction Co. vs. Mayor and Council, p. 1289.

It is a well established principle of jurisprudence that one can not judicially claim, at one and the same time, the thing and its price; nor can a litigant attack a judgment as null and void, and at the same time demand the fruits or proceeds of a sale made in execution thereof.

A creditor whose claim is unsecured by either privilege or mortgage has no right, under C. P. 801, to compel another creditor, who has a judicial mortgage, as well as the privilege of a seizing creditor, to bring the proceeds of sale into court for a ratable distribution *in concursu*.

Thompson & Co. vs. Sheriff et al., p. 1401.

PLEADING AND PRACTICE—*Continued.*

The demand based on a penal clause for the payment on a condition of the amount specified can not be pleaded in compensation against a promissory note. Civil Code, Arts. 2117, 2525, 2527, 2209; N. S. 517; 5 An. 303; 2 H. D. 254, No. 5.

Goldman vs. Goldman & Masur, p. 1633.

When several suits, identical in every respect, are filed for the purpose of obtaining the allotment of one to a certain Division of the Civil District Court, parish of Orleans, the first assignment of one will carry the others to the same Division, as there is but one case in fact and in law.

State ex. rel. Paving Co. vs. Judges, p. 1601.

A creditor of Lafargue Bros. Co., Limited, recognized as such by judgment of the Circuit Court of the United States, having caused a writ of *fi. fa.* to issue, under which a seizure was made, certain parties alleging that they were qualified liquidators of the corporation under an appointment from the Civil District Court for the parish of Orleans, in the suit of Rougé vs. The Lafargue Bros., that they were in possession of the property, rights and credits of the corporation, and that the seizure made was an illegal interference with their administration in the State court, ruled in the Circuit Court, the seizing creditor to show cause why an injunction should not issue restraining him from further proceeding. On the trial of this rule the Circuit Court ordered the seizure to be quashed unless within a time fixed the seizing creditor should file a suit in the Civil District Court, attacking the validity of the order appointing the liquidators, but holding matters in the meantime in abeyance. The seizing creditor, within the time fixed, obtained a rule in the suit in which the liquidators were appointed on the plaintiff, the defendant corporation and the liquidators to show cause why the order appointing liquidators should not be annulled, urging among grounds that the court was without power or authority to make the appointment. Defendants excepted to the rule on the ground that the plaintiff in his rule disclosed no cause of action; that the proceeding by rule was unauthorized and not in conformity to the orders of the Circuit Court, and that the plaintiff should have resorted to a direct

PLEADING AND PRACTICE—Continued.

action. The District Court maintained the exception reserving to plaintiff in rule the right to bring a direct action to annul.

Held:

The Circuit Court was obviously not concerned as to the manner in which the seizing creditor should proceed in the State court; that it was the attack itself, not its mode, which the court had in view.

The liquidators having themselves, in the rule in the Circuit Court, ruled the seizing creditors to show cause why an injunction should not issue against them, could not object to their doing so by way of answer, and the United States Court having, instead of passing upon the issue, relegated the parties to a trial of the same by the court which granted the order, the rule taken in the Civil District Court was substantially nothing more than cause assigned by the seizing creditors in answer to the rule of the liquidators, though it might not be so in appearance. All parties in interest were before the court which made the order of appointment on equally advantageous ground, and it would be subordinating substance to form to require new proceedings by direct action.

Rougé vs. Lafargue Bros. Co., Ltd., p. 1646.

PLEDGE.

Movable property declared immovable by destination by the Civil Code remains so only so long as the conditions which fix its immobility exist and the rights acquired upon it have existence, otherwise it is subject to the will and pleasure of the owner, who can detach it, pledge it, or sell it.

No formal acceptance of pledged property is required. Its delivery to and acceptance by the pledgee is sufficient to perfect the pledge under the written contract for movables pledged.

A *bona fide* purchaser of property redelivered by the pledgee to the pledgor for temporary use will be protected against the claims of the pledgee on the property.

The drawer of the bill can validly pledge property to secure an accommodation acceptor, and also to protect the future holder of the bill.

Britton & Koontz vs. Harvey, p. 259.

PLEDGE—Continued.

The holder of pledged stock under a contract to sell the same either at public or private sale, on default of the payment of the note for which the stock is pledged, who, by judicial proceedings, compels the transfer of the stock to himself, and who afterward received dividends on the shares, sells a part of the same, and does not credit the debtor with the proceeds; who votes for a reduction of capital stock in the corporation issuing the shares, and receives a new certificate of stock on surrendering the old one, will be deemed, in the absence of complaint of the debtor, as having acquired the stock as owner, under the power to sell as stipulated in the contract of pledge. The primary debt should be credited with the market value of the shares, placed upon them by the creditor, when he appropriated them.

Succession of Lanauz, p. 643.

The pledgee of a note can authorize the owner of the note to bring suit on it.

Hewitt vs. Williams, p. 742.

A mortgage executed in favor of a nominal mortgagee for the purpose of being used as collateral security is not extinguished by the payment of the debt which it secured. The mortgagor can reissue it to another creditor to secure another one of his debts. If the contract is not such as it purported to be, it will not be invalid on that account if it contains all the essentials of another contract, which may be enforced. Thus, in a contract to secure a debt by the delivery of a collateral, the declaration that the pledgee is the owner, when the essentials of a sale are wanting, will not prevent the contract from being construed as one of pledge when all the essentials of this latter contract are present.

A party who already holds pledged property to secure his debt may become, by consent of the parties and his own, the detainer of the pledge for another creditor of the debtor, after the expiration of the contract of pledge, securing his own debt.

Herber vs. Thompson, p. 800.

POLICE POWER.

The General Assembly is the sole and exclusive judge of the time and manner in which the police power shall be exerted, and its action must be liberally construed.

Garrett, Blanks et al. vs. Mayor et al., p. 618.

PONTCHARTRAIN LEVEE DISTRICT.

The repealing effect of Act 95 of 1890 has withdrawn from the Register of Land Office the ministerial duty of selling the land claimed by relator.

State ex rel. Goodloe vs. Register, p. 568.

The Legislature had the authority to vest title to land in the Pontchartrain Levee District to avoid to some extent the burdensome taxation required to defray the expenses in making needful improvements. *Id.*

POSSESSION.

Whilst mere civil or legal possession, not preceded by a real, actual possession on the part of the plaintiff or his authors, may be insufficient to support the possessory action, civil possession at the time of the disturbance is sufficient when preceded by an actual possession by plaintiffs or his authors for a year. The intention to possess preserves a civil possession continued after the natural is abandoned, unless usurped by another during the time required by law, or there be no possession for ten years. Against any disturbance in the meantime the civil possession will support a possessory action.

Where the owner of a number of squares in the outlying districts of the city of New Orleans intersected by nominal streets has leased all the squares to a single tenant, who has taken possession thereof and placed them under fence, the fact that the streets might be ultimately utilized for public purposes would not (so long as the public rights are dormant and the servitude is not exercised) break the continuity of the possession over and across the streets so as to take in and include (in conformity to the lease) the body of land leased as an entirety—so far, at least, as a trespasser is concerned.

Although proceedings in enforcement of unpaid taxes may be regular and vest a legal title in the purchaser at the tax sale made thereunder, an actual and real possession of the property does not instantly follow as the direct result of the adjudication. The fictitious legal seizing which the law makes the accompaniment of a completed act of sale would flow from such an adjudication, but the adjudication, though it would give rise to "a right to possession," would not operate of itself an actual

POSSESSION—Continued.

and real corporeal possession of the property. The State does not occupy, in this respect, a position different from that of any other adjudicatee.

Act No. 80 of 1880 provides a statutory remedy for placing adjudicatees at tax sales in possession of the property purchased.

Hanlon vs. Lumber Company, Ltd., p. 401.

PRESCRIPTION.

The prescription of one year provided for in Art. 3536, Civil Code, commences to run from the date of the damages sustained by the act complained of.

The prescription is not uninterrupted until the plaintiff can get sufficient evidence to maintain his suit.

Brown vs. Clingman, p. 25.

The prescription of one year mentioned in Art. 3536, C. C., can only be applied to damages springing from the infringement of some right personal to the individual, or relating to his property, or the violation of some duty imposed by law. If these ingredients are not present it is not a *quasi offence*.

Heirs of Burney vs. Ludeling, et als., p. 73.

It is claimed that the failure to insert in the testament the residence of the witnesses is a fatal irregularity.

The court has frequently decided that such irregularities are cured by the prescription of five years.

The heirs of age at the time the will was probated, in 1876, are without right, in opposition to the plea of prescription.

The prescription against minors dates from their majority.

Succession of Justus, p. 302.

In executed contracts which may be tacitly ratified, a presumption of ratification results from silence and inaction during the time fixed for prescription.

Brownson vs. Weeks et al., p. 1042.

The prescription of five years under Art. 3542 applies to an action brought by a wife to set aside a judicial sale which had been made during her husband's life, in enforcement of a mortgage granted by her to secure his debt. 22 An. 219.

Id., p. 1042.

PRESCRIPTION—Continued.

The borrower insured the property mortgaged to secure the debt and in the policy the clause was inserted: Loss, if any, payable "to the creditor" as interest may appear.

The policy was transferred to the possession of the creditor and he continuously, during five years, held possession.

Five years having elapsed since the maturity of the note, during which time the policy was renewed annually with the clause in question, the note in consequence is not prescribed.

Subsequent to the five years another policy containing a similar clause was taken out in lieu of the first.

The order annually given to pay the loss, if any, to the creditor, was an acknowledgment of the debt which had the effect of suspending prescription.

The possession by the creditor of the policy of insurance of the debtor, duly assigned by the latter to the former, and kept alive by payment of premium, is an acknowledgment.

The acknowledgment of a debt will interrupt prescription though such acknowledgment be not made to the creditor.

Begué vs. St. Marc, p. 1151.

Funds raised by taxation for the annual expenses of a municipal corporation are trust funds, and the prescription of one year will not protect the corporation from liability for the taxes thus collected.

School Directors vs. City, p. 1311.

PRINCIPAL AND AGENT.

Where, by the course of business in a supposed relation of principal and agent, the principal dispenses with any account of the agent, and none was kept, the heir of the principal, asserting a moneyed demand against the alleged agent, can not compel such account, least of all, in view of the fact that there are no books nor *data* to enable the asserted agent to meet the requirement of an account.

Carran vs. Chapotel, p. 408.

PRIVILEGE.

Where the creditor of a corporation has obtained a personal judgment against it with recognition that the amount due was secured by privilege on its property, and a mortgage creditor of the

PRIVILEGE—Continued.

same debtor institutes a suit against the judgment creditor to have it decreed that he had no privilege, and that if he has, that it is not effective as against him, the judgment so obtained is not *res judicata* against the plaintiff, nor is the second suit a collateral attack upon the judgment. The plaintiff was not a party to the judgment, and not bound by it. The privilege, if it existed, sprung neither from the contract of the parties, nor was it created by the judgment; it was the creation of the law. Its existence is outside of the judgment, and, as to third parties, has to be determined independently of it. Plaintiff's attack is direct upon the asserted privilege and its rank.

Article 3186 of the Civil Code, which declares that a privilege is a right which entitles the creditor holding it to be preferred over other creditors, even those who have mortgages, merely declares the nature generally of privileges, while Art. 3274 restrains and modifies this general effect in the special case provided for by it, when a privilege tardily recorded would come in competition with a pre-existing registered mortgage. For such a case it is provided, that the tardily recorded privilege, though none the less a privilege, shall fall behind and be subordinated to the prior mortgage; in other words, substantially that it should, as to pre-existing mortgages, be ranked and classed as a junior mortgage.

The object of registry is notice. When an instrument is recorded, whose registry is intended to effect the rights of third parties, as a privilege, it should contain and show upon its face, and not by reference to documents to be found elsewhere, or to proceedings to be instituted at some future time, all the essential facts which would go to create and fix the privilege.

Wheelright vs. Transportation Co., p. 533.

A party who advances money for necessary supplies to be purchased for a plantation is not required to follow the destination of the money. But, if before the money is advanced, under an agreement with the party to whom the money is loaned, a premium on a life policy is to be paid, the lender stands in the same position as one who directly furnishes the supplies, who can not claim a privilege on the crop for articles that are not necessary for their production.

Hewitt vs. Williams, p. 742.

PRIVILEGE—Continued.

The privilege resulting from a seizure or attachment is subordinate to privileges legally existing upon the articles seized at the time of their seizure.

Where a party claiming to act as the authorized agent of an Ohio firm undertakes in Louisiana to enter into, and does enter into, an absolute present contract of sale for a certain number of goods of a particular kind and description for a fixed price on credit, and there being no goods of the firm of that kind in Louisiana at that time the party acting for the firm notifies it of the sale and instructs it to ship and deliver the goods to the purchaser under the contract, and the same has been done accordingly, the firm is entitled to a vendor's privilege to secure the payment of the unpaid price as resulting from a Louisiana contract.

The fact that the firm, in order to execute the contract, has in Ohio to select out of a large number of the designated articles, certain special articles to bring them directly under the operation of the contract, or that it could have repudiated the contract, does not affect the question. The firm having affirmed the contract made on its behalf, the affirmance would give to the contract all the force of an original authority in the agent to have sold at the time, in the place, and in the manner he did. The affirmance being of a sale made by an agent as *in presenti* and as an absolute sale it would stand affirmed as made, with its character so fixed by the parties to it. There would be either no sale at all, or one as made. *Omnis ratihabitio retrotrahitur et mandato æqui paratur.*

Erman & Cahn vs. Lehman, p. 1651.

PRIZE FIGHTS.

The Act No. 25 of 1890 denounces what is commonly called a "prize fight." It provides a punishment for its violation. Prize fights may be with the *hands uncovered*, or *covered with gloves* of different weight; they are preceded by elaborate preparations and training; a purse or a prize is given to the successful fighter in the contest; the statute is designed to meet both descriptions of the prize fight.

The proviso in Act No. 25 of 1890, which says the act shall not apply to glove contests within the rooms of regularly chartered

PRIZE FIGHTS—Continued.

athletic clubs, is irrelevant to the body of the statute, and is meaningless, and is therefore rejected as in no way being a part of the act.

State vs. Olympic Club, p. 1095.

PROHIBITION.

The allegation in the petition of a relator praying for relief through a writ of prohibition, that he has no remedy in the premises otherwise than through the special relief asked, is a mere conclusion of law, carrying with it no force, in the absence of a statement of facts going to show the correctness of that conclusion.

Prohibition is not a proper remedy where relief can be reached through appeal or injunction.

State ex rel. Shaw vs. Judge, p. 1602.

PUBLIC DOMAIN.

Lands subject to equitable claims within the territory acquired by the United States from Spain under the treaty of 1819, requiring survey and confirmation by the United States, are, until the approved survey, confirmation or patent issued, part of the public domain. R. S. U. S., Secs. 2323, 2347; 8 Martin, 637; 5 N. S. 82; 3 An. 89; 4 An. 90; 12 An. 151.

Hence until surveyed and confirmed to the claimant by act of Congress referring to the survey or patent issued, no prescription runs against him.

Perkins, Wife, et als. vs. Vincent et als., p. 579.

PUBLIC POWERS.

Act No. 110 of 1880 "prescribing the manner of altering, changing or amending the charters of cities and towns in the State of Louisiana, the city of New Orleans excepted," went only to the extent of providing that such cities might lay aside their existing systems of municipal regulation and control, and assume others, not inconsistent with the Constitution and laws of the State, which were more in accordance with their ideas of propriety and convenience. It had no relation to the subject of boundaries or territory. It contained no reference to the relations between their inhabitants and the State or parish, and

PUBLIC POWERS—Continued.

conferred no power, express or implied, to alter or destroy those relations.

When a political corporation is vested with public powers and charged with public duties, in a given locality, it can not be permanently superseded in the exercise of those powers, and the performance of those duties, by having for a time acquiesced in and recognized as legal the exercise of its own powers and authority in the territory by another corporation, when the power and authority exercised were, in reality, without law to support it. Political powers and duties can not be thus transferred, acquired and discharged.

President of Police Jury et al. vs. Shayot, p. 589.

PUBLIC AND PRIVATE RIGHT.

One has, in so far as relates to health and cleanliness, in which the public is concerned, the right only to a reasonable use of his property. He is expected to endure a reasonable amount of discomfort and annoyance for the public good without compensation. It is not a divestiture of vested rights, so long as the limitations upon private rights and personal liberty are not unjustifiable and unreasonable.

State vs. Payssan, p. 1029.

RECUSATION OF JUDGES.

A justice of the peace who is, by a party litigant in his court, recused on the charge of having a personal and pecuniary interest in the suit, is incompetent to make any order except one of recusation, and assignment to some other justice of the peace in the vicinage, having concurrent jurisdiction.

State ex rel. Hogsett, Sr., vs. Justice, p. 1592.

REGISTER OF LAND OFFICE.

No ministerial duty rests on the Register of the Land Office to issue patents under an asserted contract the enforcement of which is prohibited by a legislative act. Code of Practice. Arts. 829, 830; Act of 1888, No. 106; 6 An. 68.

The competency of the Legislature to pass such an act is not affected by the provisions of the Constitutions of the United States and

REGISTER OF LAND OFFICE—Continued.

of the State protecting contracts. There is no power to compel a State to perform its contract, and the refusal of the courts to notice and give effect to a legislative act prohibiting the enforcement of such contract would be to enforce it and to coerce the State. See the bond cases, 107 U. S. Reports, 711; 27 An. 430; 33 An. 498; 38 An. 337.

A suit against the Register of the Land Office to compel him to do that which the State has forbidden is in effect a suit against the State, and of such suit the courts have no jurisdiction unless the State consents. See bond cases, 107 U. S. 711; 27 An. 430; 33 An. 498; 38 An. 337.

State ex rel. McEnery et als. vs. Register Land Office, p. 110.

REMOVAL OF CAUSES.

When a case is transferred to the United States courts from the State courts on the ground of non-residence in the State, it is accepted as it stood on the docket of the court from which it was removed, and the Federal Court has jurisdiction to pass upon the issues raised in the pleadings.

Fleitas, Wife, vs. Meraux, p. 232.

The application to remove a cause from the State to the Circuit Court of the United States is too late if filed after the delay given defendant to except or answer. Act of Congress 13th August, 1888; 25 Statutes at Large, 425, Sec. 3; 138 U. S. 298.

The delay for filing the exception or answer of the defendant is at an end ten days after citation, not counting the day on which citation is served. C. P., Arts. 180, 310; 25 An. 136.

A sale by authentic act has full effect between the parties unless a counter letter is reserved and is conclusive on all except forced heirs and creditors. C. C., Art. 1993; 11 La. 424; 9 Rob. 28.

Hence a purchaser at a tax sale under an assessment against one having no title can not, when sued by the owner, dispute his title on the ground it is simulated; whether simulated or not, it binds all except heirs or creditors of the vendor.

Ibid.

An assessment against the owner and notice to him is requisite to pass title by a tax sale made under the revenue act No. 85 of

REMOVAL OF CAUSES—*Continued.*

1888. Constitution, Art. 210; 83 An. 1162; 48 An. 426; 44 An. 912; 45 An. 1109; 46 An. 403.

Font et als. vs. Land and Improvement Co., p. 272.

That a motion to transfer a cause to the Circuit Court of the United States has been made and overruled does not divest the court of first instance of jurisdiction; nor can a petition to same effect, subsequently filed in the Circuit Court of the United States, have that effect.

State vs. Murray, (Greasy Jim) p. 1424.

RENUNCIATION.

The renunciation of a succession is a manifestation of will and consent to relinquish all rights to the succession renounced.

Our Code is silent regarding causes of nullity of renunciation; we must therefore have recourse to those general principles applying to conventional obligations in cases of error, fraud and violence.

Thompson vs. Baldwin et al., p. 344.

A renunciation may be gratuitous.

Id.

Consideration is not the essence of a renunciation.

Id.

RES ADJUDICATA.

The final judgment of a court of competent jurisdiction is *res adjudicata* between the parties, their privies, assigns or *ayants causes*.

A mortgage containing the pact *de non alienando* may be foreclosed against the mortgaged property without making a subsequent purchaser of the mortgaged property a party defendant.

In a petitory action where the plaintiff's title rests on a judgment, the defendant can attack the same. After a final judgment has been rendered it is too late, in subsequent litigation between the parties to the original suit, to supply omissions of evidence and pleas which should have been urged in the first instance.

When a case is transferred to the United States courts from the State courts on the ground of non-residence in the State, it is accepted as it stood on the docket of the court from which it was removed, and the Federal Court has jurisdiction to pass upon the issues raised in the pleadings.

Fleitas, Wife, vs. Meraux, p. 232.

RES ADJUDICATA—Continued.

A judgment rendered in a suit between a mortgage creditor of the husband and his wife, based upon a compromise of her rights and an abandonment of her title, can not support the plea either of *res adjudicata* or estoppel, in a subsequent litigation with reference to the same subject matter between the same parties, their heirs or assigns.

Lockett, Under-tutor, vs. Trust Co., p. 1260.

RIGHT OF ACTION BY LABORERS FOR WAGES.

Where a mortgage creditor has seized a plantation, subject to his mortgage, together with all the mules, carts, agricultural implements thereon, in view of an anticipated sale of the property and the realization of a fund therefrom, the laborers who claim a privilege for payment of wages due them have an unquestionable right to present their claims to the District Court by way of third opposition, without reference to the amounts claimed by them being within the jurisdiction of that court. *Shiff vs. Carpette*, 14 An. 802.

Amato et als. vs. Ermann & Cahn et als., p. 967.

SALE.

The title of a purchaser in good faith, under recorded deed and in actual possession, can not be defeated by non-registry of an anterior deed, however remote.

Williams vs. Landry et al., p. 6.

A deed of sale wherein three of the boundaries are given as certain well recognized streets in the city of New Orleans, and the fourth is stated to be "the line of the Foucher property," and this property is delineated on a map or plan of the adjacent property, bearing an ancient date, and found among the public archives of the city.

Held: This is a sale *per aversionem*.

After being set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an *estoppel in pais*, precluding the original owner from denying such dedication.

While a mere survey of land by the owner into town lots, defining streets, squares, etc., will not, without a sale, amount to a dedi-

SALE—Continued.

cation, yet a sale of lots with reference to such a plat, when bounded by streets, will amount to an immediate and irrevocable dedication of the latter, binding on both the vendor and vendee.

Leland University vs. City, p. 100.

It is the duty of the vendor to tender to his vendee a safe title. The vendee has the right to exact strict proof, as he owes no duty to the vendor, and a judgment of court ordering a specific performance by him of a contract for purchase might not be *res judicata* in a subsequent petitory action or action in nullity against him by parties other than the plaintiff.

Lockhart vs. Smith, p. 121.

Labor tickets showing simply an amount of money and "in goods" will not support either a transfer of the claims of the laborer with subrogation to the merchant, or a payment with legal subrogation by the latter.

"Delivery" is one of the incidental obligations resulting from a contract of sale, while "acceptance" bears upon one of the essential elements leading up to the creation and formation of the contract itself, viz.: consent.

When it was in contemplation of both parties to a contract of sale that the property should reach the vendee in Louisiana, and while there in his possession a portion of the price would be still unpaid, it is fair to presume, in the absence of express stipulation to the contrary, that the vendee should reserve right of final acceptance for a reasonable time after its receipt, and that both parties should contract with reference to the operation of the laws of Louisiana.

McLane vs. Creditors, p. 134.

Notwithstanding a sale is *per aversionem*, and not, on that account, entitling the purchaser to any repetition of price on account of diminution in quantity of land received, yet a different question arises when, on trial, the fact is disclosed that there is a break in one of the boundaries. In such case the purchaser is entitled to go to the boundary, and if he can not, he has a legal claim for the deficiency in quantity.

Guglielmi vs. Geismar, p. 147.

SALE—Continued.

It has been repeatedly decided that a purchaser at a sale of succession property is not bound to look beyond the decree of the court ordering the sale. It is now well settled that where there is a formal decree of the court of probates recognizing the necessity of selling the property inherited by minors for the payment of debts of the succession, and giving an opportunity to the attorney of the absent heirs to show that in fact no such necessity existed, the purchaser is not bound to look beyond the decree." *Michel's Heirs vs. Michel's Curator et al.*, 11 La. 149; *Lalaune's Heirs vs. Moreau*, 13 La. 431; *Valderes, Executrix, vs. Bird and others*, 10 Rob. 396.

Belard & Johnson vs. Gebelin & Duggan, p. 166.

The plaintiff alleges that the title to property of which he is the owner did not pass to the ostensible adjudicatee; that the amount of the bid was not paid.

The executor by whom the property was sold, many years after the probate proceedings and probate sale, appeared before a notary and acknowledged that the amount of the bid had not been paid.

The written acknowledgment was made the basis of plaintiff's suit.

The court holds that it can not be given force and effect, because it was *ex parte* and because the wrongs declared to have been committed to pass title are not given with particularity as to dates and circumstances, and further that plaintiff's father consented to the sale; that the parties must look to the proceeds and not to the property sold for whatever rights they may have.

St. Amant vs. Tessier, p. 177.

A sale by authentic act has full effect between the parties unless a counter letter is reserved and is conclusive on all except forced heirs and creditors. C. C., Art. 1993; 11 La. 424; 9 Rob. 28; 2 H. D. 1034, No. 1, *et seq.*

Hence a purchaser at a tax sale under an assessment against one having no title can not, when sued by the owner, dispute his title on the ground it is simulated; whether simulated or not, it binds all except heirs or creditors of the vendor. *Ibid.*

Font et als. vs. Land and Improvement Co., p. 272.

In a suit to dissolve the sale for non-payment of the price, brought by the transferee of the right of action, the defendant can not

SALE—Continued.

dispute plaintiff's right on the ground that the board of directors of the bank, the unpaid vendor, did not authorize its president to make the transfer to plaintiff; no complaint of that character coming from the bank receiving the plaintiff's money, the consideration for the transfer, and thus affirming it.

Nicholls vs. Bienvenue et als., p. 355.

The statement of facts by the judge granting the appeal reciting that a witness testified the tender was made as set forth in the petition, the petition containing the requisite allegation, is deemed sufficient.

In an action to dissolve the sale for non-payment of the price, it is no part of the plaintiff's duty to provoke a family meeting to advise whether or not, in the interest of the minors defendant, the tender by plaintiff of the price should be accepted; hence the judgment of plaintiff dissolving the sale will not be disturbed if such meeting was not called, even if such meeting was necessary.

In confirming a default in such case no jury is necessary, Art. 313 of the Code of Practice not applying to such confirmation.

When a statement of facts for an appeal is not applied for seasonably, in this case almost a year after the rendition of the judgment, when the memory of the judge naturally, as he states, has become indistinct, the court, if it does not dismiss the appeal because of deficiencies in the statement due to the delayed application, will, at least, construe the statement liberally, so as, if possible, to sustain the judgment. C. P., Arts. 602, 603; 31 An. 856; 10 An. 180; 7 Rob. 179.

Id., p. 356.

Where property sold is described as "a sugar plantation on the left bank of the Mississippi river having a front of one-fourth of one arpent, more or less, on said river by eighty arpents in depth," the purchaser is entitled to delivery to the full extent of the premises, as specified in the contract, and to insist upon the call for the river at the front boundary. He has the right to exact a front on the river, and by that term is meant not a front exceptionally on the river as resulting from extreme high water or flood, but one to be found on the river in its ordinary stage of high water.

Heirs of LaBranch vs. Montegut, p. 674.

SALE—Continued.

The sale by the wife of the property donated by the husband, made with his authorization through an agent with power to consent to and authorize the sale; the power describing the property as standing in his wife's name, is in legal effect the same as if made by the husband, he having the power to revoke the donation and sell; and treating the property in the act as that of the wife, is a mere form not detracting from the effect of the act as a sale by the husband, being both a revocation and a sale by him.

Nor could the husband, consenting to the sale and thus inviting the payment of the price, afterward claim the property on the ground the donation was not canceled by the sale, was still subject to revocation reinstating the ownership of the husband; such pretension by him would be deemed an attempted fraud on the purchaser, and the sale would be maintained as conveying full title to the purchaser. Bigelow on Estoppel, 541.

Lavedan vs. Jenkins, p. 725.

Where a contract made in the latter part of January calls for the sale of oil "*thereafter to be made by the seller, and to be delivered as made*," the parties to the contract must have had in contemplation a quality of oil which was susceptible of being made at that late period of the season.

In ascertaining the quality of the object contracted for, this specification as to time of making and delivery controls the mere name of the article in the contract.

Cotton Seed Oil Company vs. Refining Company, p. 781.

A party selling a tract of land and reserving the right to construct on his own land a connection or switch railroad with a road to be constructed over the land sold, a subsequent vendee of the party making the reservation can exercise no greater right than that reserved. Where the immediate vendee of the party constructs the road and builds it, there being nothing said as to its location, or the kind and character of the road, or when this is doubtful, the location of the road by said vendee, and the kind of road he builds, will conclude a purchase from him, and he can demand no greater rights than those exercised by the purchaser under the original reservation.

Palfrey et als. vs. Foster et al., p. 939.

SALE—Continued.

The purchaser has the right to a title authenticated in due form, and the absence of such evidence justifies him in refusing to take title.

Widow Botto vs. Berges, p. 959.

The title of a purchaser in good faith from the vendee in a sale with a power of redemption, after the sale has become absolute by reason of the non-exercise of the right of redemption, is secure against an attack from the original vendor or his creditors, on the ground that the "sale with redemption" was really a contract for security which did not shift the ownership. The purchaser is not affected by secret equities, unknown to him, or not disclosed by the record.

Though the knowledge which the purchaser of a piece of property has of the pendency at the time of his purchase of a revocatory action against his vendor to have his title set aside for fraud may affect him should that action terminate in favor of the plaintiff, but it does not, if it terminate in favor of defendant, charge him with general notice that the title is subject to attack on other grounds.

Broussard vs. West et als., p. 1033.

The exercise of the resolutory condition retroacts and places matters as if the sale had never existed. The plaintiff, vendor of the property, is entitled to the revenue made by the defendant debtor during the time the latter owned the plantation.

The creditor, on the other hand, must return the amounts of purchase price received, with interest.

Vincent vs. Phillips, p. 1238.

The sale of a plantation with reservation of a lot 120 feet square adjacent to other designated property can not be made to embrace other lands not adjacent.

Gaude vs. Williams, p. 1325.

The vendor under a sale conditioned that the property shall be his until payment of the price does not lose the right thus reserved, because the purchaser for the service and improvement of a building places such property therein, and against the creditor of the purchaser with a mortgage on the building the unpaid

SALE—Continued.

vendor may enforce his right to remove the property **sold**.
Lapene vs. McCan, 28 An. 749; *Carlin vs. Gordy*, 32 An. 1285;
 31 An. 735; 1 Troplong Priv. et Hypotheques, No. 113, p. 793.
Baldwin vs. Sheriff et als., p. 1466.

Where real estate is sent to sale at public auction under a written advertisement the intention of the seller as to the object intended to be sold and of the purchaser as to that intended to be bought is to be ascertained by the advertisement and not by conversation or letters written between the parties in prior negotiations for a private sale which had failed and been abandoned. The advertisement binds both parties.

Where real property is adjudicated at public auction everything which is part thereof as being immovable by destination passes to the purchaser without the necessity of specific enumeration in the advertisement. This effect ceases, however, when there are words of exclusion or reservation in the advertisement.

Where the advertisement of real estate for sale at public auction describes the property as to be sold "with the buildings and improvements thereon, and all rights, ways, privileges and appurtenances thereto belonging, or in any wise appertaining," the purchaser of the property under the advertisement acquires the ownership of all the movables made immovable by destination forming part of the property at the time of sale, although in a subsequent portion of the advertisement the property is referred to as "equipped with water connection with the Mississippi river, together with boilers, filters and pumps, which will be sold with the property, thereby securing free water." It is the duty of the seller to express himself clearly, and any obscure or ambiguous clause is construed against him. C. O. 2461, 2474.

A mere intention to dismantle a building in which machinery had become a part and immobilized by destination, remaining unexecuted up to the time that third persons acquired the property in its actual existing condition, produced no effect as against such third person.

Maginnis vs. Oil Co., p. 1489.

SEQUESTRATION.

The requisites for the writ of sequestration under Act 7th April, 1826, par. 9, p. 120, par. 7 of Code of Practice, are the same as

SEQUESTRATION—Continued.

under Art. 275, par. 6, in cases in which the claim is secured by special mortgage, and these have been followed by plaintiff in his affidavit for the sequestration.

The affidavit is of itself *prima facie* evidence of the facts authorizing the writ.

Landwirth vs. Shaphran, p. 338.

A suit upon notes not due should be dismissed as of non-suit. No sequestration can issue upon an unmatured obligation, except in the case provided for in Art. 275, C. P.

An act of a party which violates his contract for the furnishing of supplies will support an affidavit for writ of sequestration under par. 8 of Art. 275, C. P.

It is not required that the plaintiff shall detail in the affidavit the facts upon which his fear is based.

Hewitt vs. Williams, p. 742.

The fact that the debt secured by privilege is unpaid, and that the debtor is disposing of the property on which the privilege exists, though in the usual course of business, will authorize the writ of sequestration. Code of Practice, Art. 275, as amended; 8 An. 386; 36 An. 487; 40 An. 825.

Goldman vs. Goldman & Masur, p. 1463.

SHERIFFS.

Sheriffs are required to enter on the book provided for the purpose, all taxes and licenses with the interest thereon collected; the entries of the payment of the taxes and interest are to be contemporaneous with the dates of collection; from this book the parish treasurer is to transcribe in his book the taxes collected; the book is to be open at all times to public inspection, and the sheriff is also required to pay over to the parish treasurer in the first week of each month all collection of taxes and licenses; these provisions, designed to guard the public funds from loss by accident or defalcation, define functions of the highest importance to the public, and serious violation of such duties by the sheriff furnish the basis to remove him from office. Act No. 85 of 1888, Secs. 76 and 86; Act No. 84 of 1892; Constitution, Arts. 196, 201.

SHERIFFS—Continued.

That the sheriff finally pays over the taxes and licenses collected by him will not excuse the breaches of official duty in not keeping his books as prescribed by law, in respect to his receipt of public funds, and in not making settlement at the periods designated by the statute; to hold that settlement at last is to be accepted as the equivalent of such public duties not performed, would be to make public funds dependent for their safety on the ability of the sheriff to settle finally, and would displace the statutory requirements of faithful accounts and prompt settlement, which, if observed, would effectually protect the public interests.

State ex rel. District Attorney vs. Sheriff and Tax Collector, p. 278.

STATEMENT OF FACTS.

The statement of facts by the judge granting the appeal reciting that a witness testified the tender was made as set forth in the petition, the petition containing the requisite allegation is deemed sufficient.

Nicholls vs. Bienvenue et als., p. 356.

STATE BOARD OF ARBITRATION.

The distinguishing features of the statute are that an investigation may be held without the consent of all parties:

On application of employers or employees, or the latter's duly authorized agent.

On notification from the Mayor, or a District Judge in the parishes, that a lockout or strike is seriously threatened.

It devolves upon the board, in the first instance, to pass upon questions of regularity and compliance with the statute *vel non*, in those steps taken to bring labor troubles to its notice.

The board is authorized to hear the parties; make inquiry into the causes of trouble, advise the parties, and keep a record of their decision regarding the causes of dispute.

Railroad Co. vs. Board of Arbitration, p. 874.

They are not bound in all things to decide according to technical rules of law that would possibly determine issues in a court of justice, but they are subject to the terms of the statute under which the board was organized, and they are bound to observe those broad rules of law and equity, without which no board of arbitration and conciliation can make a just decision.

STATE BOARD OF ARBITRATION—Continued.

Objections upon grounds of irregularity must be urged before the board, and heard contradictorily with parties concerned, or their duly authorized representatives, prior to application to the courts to correct alleged errors.

Id., p. 875.

STENOGRAPHER.

The stenographer in the Civil District Court is an officer of the court. Sec. 1, Act No. 94 of 1876.

Section 1, Act No. 3 of 1894 requires that the original testimony taken by the stenographer shall be embodied in the transcript of appeal.

A rule of the District Court, which requires "leave of the court" to be obtained before sending up original papers to the Supreme Court, yields to the statute. The "*order of the law*" takes the place of the "*leave of the court*."

State ex rel. Legendre vs. Clerk, p. 358.

STREET RAILROADS—FRANCHISE.

Under City Ordinance 1204 plaintiff acquired a street railroad franchise on Canal street, in the city of New Orleans, containing a certain reservation therein. Subsequently the defendant acquired a similar franchise under the reservation of said ordinance. Soon afterward the franchise of plaintiff lapsed under its contract. In the meanwhile litigation arose between the two companies with regard to plaintiff's right to claim *trackage* of the defendant, which resulted in a judgment in favor of the latter. Thereafter plaintiff acquired a new grant under another ordinance, which conferred the right to charge *trackage*.

Railroad Co. vs. Railroad Co., p. 314.

Held, that the judgment between the parties in said former litigation operates as *res adjudicata* against the plaintiff, with respect to its assertion of its claim for *trackage* under its new grant—said grant and the city ordinance under which same was acquired not having the effect of changing the relations of the parties so as to defeat the effect of the previous judgment.

Id., p. 315.

SUBROGATION.

One who claims the ownership of a note secured by mortgage and a subrogation by purchase, who is not shown to have been a creditor, is not entitled to legal subrogation. The defendant, on the notes paid by him for the maker, is not entitled to legal subrogation.

Coco vs. Gumbel, Liquidator, p. 966.

SUCCESSIONS.

A person holding at one and the same time the position of testamentary executor of an estate and tutor of the minor heirs therein, can not receive and disburse a fund in the capacity as executor and charge commissions upon the fund as being in his hands as tutor.

Succession of Milmo, p. 126.

When the heirs take from the succession of their mother as legatees, the co-heirs are entitled to citation to establish or oppose the executor's account in which he, the executor, applies to deliver the husband's property in satisfaction of the legacies left by the mother, before making any proof that there was a translation of the property to the latter.

The account could not be made binding upon the heirs on a judgment of homologation made without citation.

Succession of Couder, p. 810.

Where no claims having been registered against a succession under Art. 3275 of the Civil Code, no separation of patrimony asked for, nor administration sought, the heirs have been placed in possession, the holder of an unliquidated claim against the succession can not have it judicially established contradictorily with a universal usufructuary, whose usufruct has been constituted by the last will of the deceased. He must proceed against the heirs. Such a usufructuary is not directly bound for the debts (Civil Code, 533) and the property has become the property of the heirs.

Godwin vs. Newstadt, p. 842.

If the property of a succession is sent to sale to pay debts by reason of the administration having no funds wherewith to pay the same, the sale will stand if the debts actually due were such

SUCCESSIONS—Continued.

as to call for the sale, although the application for the sale may have set forth a larger amount as being due than really existed.

If a purchaser of succession property, at a succession sale, pays a portion of the price to meet privileged claims, receives a deed in which it is declared that he retains the balance in his own hands, secured by special mortgage and vendor's privilege in favor of the succession, conditioned to meet all claims which might be adjudged prior to his own, and subsequently an account is filed and regularly homologated, in which he is recognized as a creditor for the retained balance, the adjudication to him can not be treated as an absolute nullity on a claim that he was not a creditor of the succession, or a creditor to the amount he asserted himself to be.

The fact of the homologation of a final account without the production of vouchers in support of the claims therein set forth loses in "action of nullity" the force which it would have on an "appeal."

Heirs of Simonin vs. Czarnowski, p. 1334.

Without an order of court the executor, although an order had been issued to sell the property to pay debts during the year 1891, cultivated the place, although held under a lease (without attempting to dispose of the lease, or obtaining order of court to continue it).

He was properly charged with the rental value of the place, as fixed in the contract of lease. The admitted value of the use of the agricultural implements was properly charged to the executor. The price at which they sold by public auction must be added to his indebtedness, and not the inventoried value.

The judgment properly charged for the use of the mules and the price; from this is deducted the small item for forage fed to the mules. The executor who fails to prove why he did not collect a twelve months' bond is responsible for the amount of the bond. An executor who does not compel an adjudicatee to comply with his bid (without good reason) is properly charged with the amount of the bid.

The executor can not question the correctness of his own approval of a claim against a succession, unless there was manifest error.

SUCCESSIONS—Continued.

Payments made by an executor without an order of court are subject to the closest scrutiny, and should not be allowed unless manifestly correct.

Succession of Beeman, p. 1355.

Heirs who take possession of a succession are responsible to the other heirs for the portion taken by each heir, and not in *solido* for the entire succession. In all cases of conflicting testimony, based upon the recollection of witnesses, and on estimates made by them, it is safe to accept the conclusions of the trial judge, whose position enables him to judge with accuracy of the weight to be given to the testimony of each witness.

Longino et als. vs. Phipps, p. 1430.

Congress appropriated five thousand dollars to the heirs and legal representatives of one of the victims of the Ford Theatre disaster.

It does not go to the administrator, as assets of his succession, and is not imputable to the payment of his debts.

Succession of Mulledy, p. 1580.

SUPREME COURT.

The supervisory control of the Supreme Court over inferior tribunals extends to the examination of the proceedings in an unappealable case, and if it appears that a justice of the peace has rendered a judgment against the relator without giving him a hearing, or in a case where he has no jurisdiction over the person of the defendant, who does not appear and answer the demand, the judgment thus rendered will be annulled.

The action of nullity instituted by the relator does not prevent the application to this court for relief in the exercise of its supervisory jurisdiction over inferior tribunals.

State ex rel. Waller vs. Justice of the Peace, p. 27.

The Supreme Court will not, by writs of *mandamus* or *certiorari*, review orders or decrees of the lower court made months before any application here.

State ex rel. Evershed vs. Judges, p. 180.

Where a judgment which the Supreme Court has rendered (in which it has passed upon all the issues submitted to it) has become

SUPREME COURT—Continued.

final, and its decree has been sent down to the court in which the judgment appealed from was rendered, the cause returns under the jurisdiction of the latter court for execution, subject to the revision and supervision of the Supreme Court as to that execution.

The Supreme Court will not interfere with the execution, except in clear cases of oppression or injustice, or in cases of inconsistency with its own decree.

Succession of Bey, p. 219.

Where by order of court three rules had been taken by an executor upon an adjudication at succession sale of three different properties to show cause why the adjudication should not be complied with, have been consolidated and a single judgment has been rendered, the aggregate amount in dispute and not that involved in each separate rule will determine the appellate jurisdiction.

Succession of Justus, p. 302.

The Supreme Court has no power to issue a writ of *habeas corpus* except in cases appealable to it. The writ of *habeas corpus* can not be employed so as to operate as an appeal for the review of the proceedings of the lower court. The writ of *certiorari* is only auxiliary to the writ of *habeas corpus*.

State ex rel. Audibert vs. Civil Sheriff, p. 334.

The District Judge having, in a criminal case, rendered judgments upon the appearance bonds of the accused, which by their terms were not final, but provisional judgments, subject to re-examination and recall, and having subsequently set these judgments aside on rule, the orders of the court, setting them aside, and setting at large for future examination and determination all questions touching the rights of parties upon and under the bonds, are not such judgments or orders as are appealable to the Supreme Court.

State vs. Holland et al., p. 362.

Where suit is brought against a party for payment of a license imposed by an ordinance of the police jury of a parish, and defendant defends on the ground that the police jury has no jurisdiction

SUPREME COURT—*Continued.*

for purposes of taxation over the locality in which he lives, and is estopped from exercising authority therein, the issue between the parties is one involving the legality of the tax, and falls within the appellate jurisdiction of the Supreme Court.

President of Police Jury vs. Shayot, p. 589.

This court has jurisdiction *ratione materiæ* to try a case involving the constitutionality and legality of a local assessment for levee purposes, though the amount involved is less than \$2000.

A judgment of non-suit is appealable as a final judgment.

Railroad Company vs. Sheriff, p. 706.

In their contention the laborers had a common interest in invoking the aid of the District Court; the aggregate amount of the claims in dispute being over \$2000, the appeal by plaintiffs to this court will be maintained.

Amato et als. vs. Ermann, Cahn et als., p. 967.

The proceedings attacked as fraudulent were ordered in a suit in the parish of St. James. The seized debtor and the seizing creditors charged with collusion are necessary parties to such an action. The seized debtor resided in the parish of St. James. The proceedings were properly attacked in the court of his domicile. Having issued the orders the District Court of St. James was the proper tribunal to pass upon the issues.

Amato et als. vs. Ermann, Cahn et als., p. 967.

Before invoking the supervisory jurisdiction of the Supreme Court, the party applying for relief must exhaust his remedies in the lower court. When it is alleged the lower court is without jurisdiction, it must appear that a plea to the jurisdiction was filed in the lower court.

State ex rel. Wright vs. Judges, p. 1293.

The probability that in the settlement of the succession the appellant's proportion of the assets will be less than the minimum jurisdictional amount of this court is not cause for dismissal of the appeal.

SUPREME COURT—Continued.

The value of the property, the sale of which the appellant seeks to annul, is the test of jurisdiction. *Katz & Barnett vs. Gill*, 48 An. 1041.

Vincent vs. Phillips, p. 1238.

Under our jurisprudence the Supreme Court has no control of a general character over inferior courts. If the grounds of complaint urged against the decisions of the lower courts in unappealable cases be such as pronouncing judgments without citation, or refusing to hear witnesses, or other violations of right, rendering the proceedings void, the wrong may be corrected by the writ of *certiorari*. The law is careful to limit the writ to such cases. Code of Practice, Arts. 855, 857. The writ of prohibition issues only when the lower court exceeds its jurisdiction. Code of Practice, 845. The powers of the court are enlarged by the Constitution in respect to these writs so as to embrace all lower courts, but are still substantially restricted within the limits of the Code. The series of decisions, in cases on application for these writs, all affirm the bounds of jurisdiction in this respect, dispensing with the necessity of any special reference.

The Code of Practice confers on judges of the lower court the power to sign judgments or grant new trials. Such functions involve the exercise of judgment which no other court can control. It has often been held that the lower courts can not be compelled to act in any matter in reference to which they must exercise judgment. To compel the lower court to set aside an order for a new trial in this case would be manifestly to supersede his power to refuse or grant the new trial, a power the law supposes he will exercise in accordance with his judgment. It is for the Legislature to determine what jurisdiction this court shall exercise and within the scope of the jurisdiction conferred.

State ex rel. Snider vs. Judge, p. 1482.

The Supreme Court is without power, in the exercise of its supervisory jurisdiction, to coerce the Circuit Court of Appeals to reinstate a case it has dismissed for want of appellate jurisdiction, and to try and decide same on its merits.

State ex rel. Liggins vs. Judges, p. 1516.

In the exercise of its supervisory jurisdiction the Supreme Court, when proceedings in the lower court have been regular, will not

SUPREME COURT—Continued.

review nor disturb the judgment because of insufficiency, or want of evidence to sustain it.

State ex rel. Hogsett vs. Justice of the Peace, p. 1533.

The Supreme Court will not entertain an application for bail until all remedies have been exhausted in courts below.

State ex rel. Milliet vs. Recorder, p. 1677.

SURETYSHIP.

Suretyship, like other contracts, requires assent manifested by the parties, so that each may know the other is bound; hence a paper addressed L. & J., San Francisco, California, worded "I agree to become surety to you for ten thousand dollars, for B. & B.," sent to L. & J. by the party who obtained, it does not constitute a contract without acceptance in any form, manifested by L. & J. to him who signs the paper entitled to know, and to know seasonably, whether he is to be held, and between him and L. & J. there being no communication of any kind whatever, expressive of their assent. R. O. C. 1797, 1798, 1800, 1801, 1802 *et seq.*; 1 La. 189; 6 La. 218; Story on Contracts, Sec. 853; 1 Brandt on Suretyship, Sec. 158 *et seq.*

Nor can it be doubted that guarantees and letters of credit require, under the commercial law as under our Code, acceptance communicated to the parties signing such letters or guarantees, unless acceptance is plainly implied, as, for instance, when the guarantee pays, and the guarantor receives a consideration for the guaranty; such acceptance is, as expressed by the Supreme Court of the United States, a reasonable requirement to enable the guarantor to know the nature and extent of his liability, and to exercise vigilance in guarding against loss which might otherwise be unknown to him. Story on Contracts, Sec. 853; 1 Brandt Suretyship, Sec. 158, *et seq.*; 16 La. 543; 7 An. 385; 7 Peters, 125; 12 Peters, 213; 104 U. S. 167.

The words "I agree to become surety for ten thousand dollars" with no designation of the debt, whether past, present or future, will not authorize the construction that the proposed suretyship extends to future as well as past debts; such construction is to supply, forbidden by the Code, that which is neither expressed or implied; in such case resort to the testimony is proper to ascertain the intention. Civil Code, Arts. 3035, 3039; 1 An. 62; 3 An. 257.

SURETYSHIP—Continued.

When a suretyship is to bind for a limited period plainly stated, the suretyship will not attach to debts contracted on terms of credit extending beyond the period fixed for the surety's liability.

Lachman & Jacobi vs. Block & Bro. et al., p. 505.

SYNDIC'S ACCOUNT.

Where, after judgment on a syndic's final account, a rule is taken on him to subject him to the payment of interest under the provisions of Sec. 1870, Revised Statutes, no judgment can be rendered against him for amounts which he failed to deposit in a chartered bank prior to the judgment. The claim should have been made before judgment of homologation, by which the creditor is concluded. Interest on a claim on a rule, taken after judgment of homologation, against the syndic on failure to deposit amounts and keep books, required by said section, can only be allowed after judgment, and ceases on payment of the judgment.

Chapoton vs. Her Creditors, p. 822.

TAXATION.

The limitation of ten mills of parish or municipal taxation permits the levy up to that limit by the parish, and the levy up to the same limit by the municipal corporation. Constitution, Art. 209; 36 An. 328; 84 An. 362; 28 An. 230.

Bank vs. Constable, etc., p. 1471.

The legality of a tax is contested when it is alleged that there is no law under which the license or tax can be imposed.

State vs. Lundie & Riggs, p. 1596.

TAX SALE.

The averment that an assessment and sale had been made, followed by allegations that they were null, is not an admission which concludes the plaintiff.

An assessment and sale may have been null and not cured as to the nullities by the healing and curative statutes—38 of 1882 and 82 of 1884.

The property was assessed in the name of a dead man, many years after his death, and sold at tax sale in his name. The adjudication was null.

Edwards et al. vs. Fairez, p. 170.

TAX SALE—Continued.

An assessment against the owner and notice to him is requisite to pass title by a tax sale made under the revenue act No. 85 of 1888. Constitution, Art. 210; 33 An. 1162; 43 An. 426; 44 An. 912; 45 An. 1109; 46 An. 403.

Font et als. vs. Land and Improvement Co., p. 272.

A tax sale made in exact conformity with the requirements of Act 82 of 1884, and the principles announced in the *Lake* [40 An. 142] and *Douglass* [41 An. 765] cases, will be affirmed to pass a legal and valid title—there being no question raised as to the legality in the assessment of the property.

Henderson vs. Ellerman, p. 306.

A sale of property under Act 82 of 1884 can not be invalidated because of the fact that a part of the taxes for which it was sold were incorrectly assessed, and her portion of said taxes having been regularly and legally assessed.

Title to the property standing in the name of H. C. Dibble, as tutor for certain minors, not mentioning their names, furnishes a proper basis for an assessment of the property in the name of H. C. Dibble, tutor.

Notwithstanding the word "tutor" is omitted from some of the assessments, it can not be doubted that the assessing officer had recourse to that title, and examined it preparatory to making same; and that same was taken, in good faith, as the basis of said assessments as made.

Dibble vs. Leppert, p. 792.

Where there is confusion regarding the name of the tax-payer and only part of the property was assessed, a sale tax proceeding and transferring title to the whole property, to a purchaser, is a nullity.

Reems vs. Recorder of Mortgages, p. 1138.

A tax sale of property in its entirety, composed of distinct portions acquired under separate titles, will not be sustained if it is reasonably certain a smaller portion could have been sold for enough to pay unpaid taxes, interest and costs. Constitution, Art. 210; Burroughs on Taxation, Chap. II, p. 204.

TAX SALE—Continued.

The constitutional requirement, the tax collector shall sell at the tax sale the least quantity of the property that will bring the unpaid taxes, is not fulfilled by the statement that he offers any portion that any one will buy; the offer should be of a portion specific as to quantity and location, so that the purchaser may know what he buys and that delivery may be made. *Ibid.*

Neither the administrator or attorney of a succession can surrender property by affirming a void tax sale.

Land and Improvement Co. vs. Succession of Fasnacht, p. 1294.

The defendant in the jactitation suit, who sets up title, assumes the burden of proof of the plaintiff in the petitory action. 9 Martin, 715; 4 An. 90; 35 An. 356.

The plaintiff in the petitory action, met by defendant's assertion of a tax title, may without pleading controvert its effect. 11 An. 546; 3 Lr. 392; 2 Hennen's Digest, 1155.

Neither the purchaser of property adjudicated to him under the act of the Legislature, No. 82 of 1884, nor those who hold under him can assert titles, unless the taxes levied subsequent to 1879 have been paid. Act No. 82 of 1884, 42 An. 677.

Hence, without such payment, such purchaser, or those holding under him, have no right to question the redemption of the property from the State by the owner, who, paying all taxes due, holds the redemption certificates, releasing all claims of the State.

Least of all can such purchaser, or those holding under him without title, because of non-payment of the taxes on which the title depended, invoke the prescriptions supporting tax titles.

The purchaser at the tax sale had assumed to pay the taxes due since 1880, as part of the purchase price; having failed to do this, he did not acquire title.

The owner paying the taxes, on the default of the purchaser, acts for his own account; he was under no obligation to pay and keep down taxes for the benefit of the purchaser at the tax sale.

Remick. vs. Lang, p. 914.

Blood vs. Negrotto, p. 1182.

The ordinance for the relief of delinquent taxpayers in the Constitution of 1879 authorizes the sale in the mode directed by the Leg-

TAX SALE—Continued.

islature of property on which taxes prior to 1879 were due, as well as of property forfeited or belonging to the State at the date of the Constitution.

Under this ordinance it was competent for the Legislature to direct the sale on newspaper notice for taxes of *such* property, i. e. that forfeited or belonging to the State, or on which taxes levied prior to 1879 were due. See Ordinance *Ibid.* Act No. 82 of 1884.

The court adheres to the line of decisions that the deed to the tax purchaser under the Act No. 82 of 1884 is conclusive of the sufficiency of the assessment of the property. 40 An. 142; 41 An. 765 and similar decisions.

Castillo vs. McConnico et als., p. 1473.

A purchaser at said subsequent tax sale will be protected by the showing on the conveyance records exhibiting a title to the State; and such record is sufficient to authorize the proceedings and sale by the tax collector.

Denegre vs. Buchanan & Donan, p. 1559.

If plaintiff was an absentee or was absent from the parish in which the property is situated, the evidence of the fact is too general to sustain an action to annul and set aside a sale made more than five years prior to the suit.

The legal presumption is that the tax collector gave the notice as declared in the deed. Until the contrary appears, a deed of record these many years, without question, will not be annulled for the alleged want of notice.

The error charged in not having appointed a *curator ad hoc* to represent the taxpayer, in order to avail must be shown beyond question, otherwise title to real estate would at times be extremely uncertain.

Pickett vs. Athletic Club, p. 1805.

The title claimed to be derived from a tax sale of property encumbered at the time of the tax sale with a judicial mortgage still of record against the owner, will not be forced on a proposed purchaser under his agreement to buy, unless the tax sale is produced and its *prima facie* effect is unimpaired by testimony.

Fitzpatrick vs. Leake, p. 1844.

TAX SALE—Continued.

When an apparently valid and regular adjudication to the State has been suffered to remain on the public records for several years, unchallenged by any party in interest, it will constitute a sufficient basis for a proceeding under the act of 1880, enacted in pursuance of the provisions of the delinquent debt ordinance, notwithstanding said tax deed is shown by proof at the trial not to have been actually signed by the tax collector.

Denégre vs. Buchanan & Donan, p. 1559.

TRIAL—CHARGE OF JUDGE.

When the judge is requested to charge the jury in a series of instructions, tendered *in globo*, as one charge, and he declines to give the instructions, the party tendering them should designate the particular instruction rejected to which he excepts. When the charges so tendered are mere abstract propositions of law, without any particular bearing on the case, and some more specifically direct the attention of the jury to particular facts, and others embrace matters fully covered in the general charge, the trial judge ruled properly in rejecting the entire charge so requested.

Wimbish vs. Hamilton, p. 246.

TRIAL—CONTINUANCE.

It is well settled that, without a bill of exceptions, this court will not review the decision of the court below, refusing a continuance.

State vs. Broddon, p. 378.

Physical inability to be present and manage the trial of a cause is good ground for continuance, and same being refused and the suit of plaintiff being dismissed, it is good reason why the cause should be reinstated for trial.

Railroad Co. vs. Sheriff, p. 706.

TUTORSHIP.

The appointment of a testamentary tutor by the father, acquiesced in by the surviving widow, will not prevent her, when the tutor so appointed fails to qualify, from nominating a tutor by will to the minor children.

Succession of Farrelly, p. 1687.

The right to appoint a tutor by will is accorded to the husband or wife dying last, and in order to forfeit this right there must

TUTORSHIP—*Continued.*

be a clear renunciation of the right, equivalent to an absolute abandonment of interest in the minor's welfare, or a failure to be maintained in the tutorship of the children on a second marriage of children by the first marriage.

Id., p. 1670.

Where the *mortuaria* in a succession show the confirmation of a natural tutrix and under-tutor to the minor children of a deceased person, an inventory signed by them, proceedings of a family meeting, homologated by the court upon a *proces verbal* regular in every respect, approved by the under-tutor, an order of sale, based on those proceedings, followed by a sale on the terms fixed, a final account and tableau of distribution signed by the tutrix, approved by the under-tutor, and homologated by the court, carrying the proceeds of the sale to the credit of the succession and the balance to the payment of privileged debts of the succession and the balance to the payment of a debt declared to be due the purchaser at the sale, and an order finally made by the court, upon the application of the tutrix, after a hearing contradictorily had with the under-tutor, canceling the mortgage upon the property of the tutrix, on the allegation that the property of the succession had all been disposed of, had proved insufficient to pay its debts and left nothing for the minors, it can scarcely be asserted that the administration of the succession was a "fictitious" one, or claimed that the purchaser at the public succession sale could be proceeded against by a petitory action, ignoring the succession proceedings. To reach the purchaser and the property sold, actions of nullity were essentially necessary.

Though the tutrix may not have known the "name" of the particular attorney who conducted the succession proceedings in her name, and may not have employed that particular attorney, or authorized any one to employ him, it does not follow that the proceedings taken through the attorney were null and void; they must stand, if, with her consent, "an" attorney had been employed and she had acted upon proceedings taken out in her name by him.

Heirs of Simonin vs. Czarnowski, p. 1384

UNINCORPORATED ASSOCIATIONS.

Unincorporated associations conducting the banking business are liable as commercial partners. Story on Partnership, Sec. 164; Civil Code, Art. 446.

Such associations claiming exemption from that liability as corporations must show compliance with the substantial requisites prescribed by our legislation respecting the organization of private corporations. Among these requisites are the statement in the act of organization of number of the shares held by the shareholders and publication of the act in the mode prescribed by law. Revised Statutes, Secs. 275, 279, 282; Cook on Shareholders, Chap. 13, Secs. 230, 231, 232, 233, 234 *et seq.*; 16 An. 153; 29 An. 370; 33 An. 635.

The depositor seeking to recover the amount deposited is not estopped from holding liable as commercial partners the members of such unincorporated association by the fact that they conducted the banking business in the name of a bank, appointed a president and cashier, issued certificates of deposit, and assumed to be a *de facto* bank. Cook on Shareholders, *Ibid.* and above authorities.

Williams vs. Hewitt, p. 1076.

WALLS—NEW BUILDINGS.

Where a building has been condemned by an inspector under a city ordinance, and no notice of the fact has been given to the owner, and the City Council has taken no action and the building is repaired by the owner, the fact of the inspector's condemnation will not prevent the owner from recovering damages for injury by the erection of a wall close to and adjoining his and at one part attached to it. An adjacent proprietor has no right in building a new wall to cut away, disturb or weaken a part of the foundation of his neighbor's wall, or to cause the projections of his wall to rest on that of his neighbor, and if it cause injury or damage, he is responsible.

Bonquois vs. Monteleone, p. 814.

WHARVES.

The duty is imposed on the Commissioner of Streets to see that produce and goods landed on the wharves are laid as near as possible to the paved part of the levee; also to have removed obstructions and encumbrances.

WHARVES—Continued.

The performance of that duty need not, necessarily, be preceded by his order to remove all goods and wares to warehouses, at the owners' expense, forty-eight hours after they are discharged on the wharves.

State ex rel. Construction Co. vs. Fitzpatrick, Mayor, p. 1289.

WITNESS.

A person, other than a licensed physician (for instance, trained nurses in the Charity Hospital), may have such knowledge of a particular disease as to make their statements regarding its existence, condition and state of progress, thoroughly reliable.

State vs Dixon, p. 1.

The affirmative testimony of two witnesses outweighs the negative testimony by which it is sought to contradict them. *Hepburn vs. Bank, 2 An. 1007.*

In a suit for damages for injuries to his wife the husband is a competent witness. C. C., Art. 2281; Act 1888, No. 59.

Jones vs. Railroad Co., p. 388.

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